

# PROCTOR



Queensland  
**Law Society**

October 2018 – Vol.38 No.9

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# Family law

## Wearing all the hats

Recently, I have been speaking about excellence in the law, civility and collegiality.

This month, I would like to talk about the importance of lawyers in the family law sphere as there has been a focus on this area of law in the media and parliament of late.

It is fraught with emotion, as it takes into account some of the client's most valuable assets as well as their children. Family lawyers wear many hats. You are not only a family lawyer, but also a property lawyer, a litigator, a counsellor. You're a professional shoulder to lean on in some of the toughest times your clients may ever go through.

A family lawyer is not only the defender but also the protector who fights for the rights of your client when required. You also have a responsibility not to enflame what might be an already acrimonious situation. The need to filter highly emotional responses from clients and not simply act as 'post-boxes' is crucial in this space. All of this you do within the day-to-day of your practice. You also work within a justice and family law system that you don't have control over.

With the constant evolving news of changes to our family law courts, it is yet another concern to throw into the mix. We are all aware that the family law courts are chronically overburdened. This creates delays, and prolongs the resolution of family law disputes. We recognise that ongoing conflict can have harmful and long-term effects for children. Particularly, in matters involving family violence, any delay can potentially expose a person or their children to greater risk.

We know that family law is already complex, and we do not need to exacerbate the emotional aspect by seeing extensive delays and widespread changes. There have been many opinions – both educated and less so – floating around in the media. You may be asking what your Society thinks of all this. We have a comprehensive list of items we are calling for to ensure that our family lawyers and their clients have the smoothest, and most fulsome experience with our court system.

We call for efforts to reduce the adversarial nature in some aspects of the family law system, and enabling judges to tailor the style of hearings to the needs of the parties. This would see a better use of existing powers under the *Family Law Act 1975* (Cth). The redevelopment of the *Family Law Act* is also on our agenda, and we would like to see the diversity of family structures and background reflected. It should be about the welfare of all children, regardless of their family structure.

The Society is calling for improvements to family law, including better accessibility for vulnerable and disadvantaged groups, and national status of children legislation which creates a consistent approach to parentage. It is also important for funding to the legal assistance sector to increase, to ensure litigants are properly informed, represented and have the best possible understanding of their rights.

We would like to see appointments to the court of judicial officers with family law experience. Family law is a diverse and unique area and there must be considerable expertise to ensure that the proper determinations are made in family law disputes. It is important that a single specialist family court exists, with a single set of rules and forms.

Having the right people in the right judicial roles is of great import. We have excellent members of the judiciary, and legal practitioners who have the expertise and experience to take on such roles. We should utilise them to the best of their ability, and for the best interests of the public.

The Society would also like to see measures which protect vulnerable litigants from systems abuse, and improved collaboration and information sharing between the family courts and state and territory child protection and family violence systems.

Additional funding for independent children's lawyers and family consultants is also key to improving the experience of children in court proceedings, and ensuring their views are heard and understood.

We will call for these items and more in our next federal Call to Parties document, to be released once an election is called by the current government. You can view our previous Call to Parties documents on our website [qls.com.au/fedelection](http://qls.com.au/fedelection).

Thank you to our family lawyers – and to all of our practitioners – for their continued excellent work in an often complex and changing space. The work you carry out does not go unnoticed.

### Ken Taylor

Queensland Law Society President

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# Try a taste of Indigenous procurement

## Helping to close the gap of disadvantage



### A Reconciliation Action Plan (RAP) is a lot more than an acknowledgement of respect for Indigenous culture.

It is, after all, an *action* plan, which encompasses positive actions to be taken in relation to a host of things, including employment and even procurement.

October is National Indigenous Business Month – a time to recognise and promote the growing number of businesses owned and operated by members of Australia's Indigenous community.

This initiative came from a meeting of Indigenous entrepreneurs who took part in the MURRA Indigenous Business Master Class program at Melbourne Business School in 2015. It has since been adopted by government and many in the business community, including law firms.

The Queensland Government has established an Aboriginal and Torres Strait Islander Business and Innovation Reference Group and a Queensland Indigenous Procurement Policy (QIPP) which came into effect last year. This has the aim of increasing procurement with Indigenous businesses to 3% of annual spend by 2022 – and with the Government spending around \$18 billion a year on procurement.

I have spoken to other organisations, including law firms, about Indigenous procurement. McCullough Robertson's Director of Human Resources, Louise Ferris told me that the firm has a long history of engaging with Indigenous organisations and community. She said the firm had worked specifically on Indigenous procurement for just over two years.

"We are committed to achieving meaningful reconciliation with First Nations people and we believe we have a role to play to help close the social and economic gap faced by First Nations people," Louise said.

"Our plan for reconciliation is focused on these areas. We believe that through First Nations procurement we are able to provide proactive support to First Nations businesses of all different sizes and stages of their business development, in turn creating opportunity and building relationships."

The firm has engaged with First Nations businesses in the areas of presentations and education events, catering, office supplies, artwork, consultancy and advisory services.

"We recognise that supporting First Nations businesses and creating economic and employment opportunities is a meaningful way to address the social and economic gap experienced by First Nations people, and enables us to engage with and support the communities in which we work," Louise said.

"We benefit from the engagement with diverse businesses and the products and services they provide. We encourage members of the firm to participate in activities that acknowledge and promote the contribution, culture and history of First Nations people and the opportunity to engage First Nations businesses, products or services supports us to do that."

Indigenous law firms and organisations are also proud supporters of Indigenous business. The President of the Indigenous Lawyers Association of Queensland (ILAQ), Avelina Tarrago, said she believed that, if the ILAQ supported its community, its community would support the ILAQ.

The association procures goods and services including its website and media from an Aboriginal-owned company, catering from a Supply Nation-approved company and entertainment from the Aboriginal Centre for Performing Arts.

When it comes to sourcing goods and services from Indigenous providers, you can start with websites such as Supply Nation ([supplynation.org.au](http://supplynation.org.au)) and Black Business Finder ([bbf.org.au](http://bbf.org.au)).

At QLS<sup>1</sup> we procure a variety of services and products from First Nation's businesses including office stationery, catering and water.

I'd also recommend having a look at the KPMG publication, *Igniting the Indigenous Economy* (search for it at [kpmg.com.au](http://kpmg.com.au)) which will give you a much broader view of the topic than I am able to present here.

Supporting Indigenous enterprises will enhance your corporate social responsibility and offer some diversity in your purchases. For some firms, it makes a significant point of difference.

By supporting Indigenous suppliers you are also creating jobs for Indigenous workers and helping to close the gap of disadvantage.

### Rolf Moses

Queensland Law Society CEO

#### Note

<sup>1</sup> Check out our RAP at [qls.com.au/RAP](http://qls.com.au/RAP).

# OUR GENERATIONS

Our member snapshot, which features in the 2017-18 QLS annual report, highlights the predominance of females entering the legal profession – representing some 60% of newly admitted practitioners. During the year, the number of full members rose to 10,390.

## MEMBERS BY GENERATION\*



	Male	Female	Total
<b>Builders</b>	70	6	76
<b>Baby boomers</b>	1598	505	2103
<b>Generation X</b>	1772	1608	3381
<b>Generation Y</b>	1772	2983	4756
<b>Generation Z</b>	24	50	74
<b>Total</b>	<b>5238</b>	<b>5152</b>	<b>10,390</b>

Our 2017-18 annual report will be available from [qls.com.au](http://qls.com.au) as soon as it's tabled in Parliament, and see next month's *Proctor* for a bite-size summary of annual report highlights.

\*Generation category and year of birth range: Builders 1925-1945; Baby boomers 1946-1964; Generation X 1965-1979; Generation Y 1980-1994; Generation Z 1995-2010.

## AGM SAVE THE DATE

Queensland Law Society's  
annual general meeting  
will be held on

Tuesday 4 December 2018 at 5.30pm

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# QLS calls on new PM for change

Queensland Law Society has called for change in the legislative and legal assistance spheres after Australia welcomed its 30th Prime Minister, Scott Morrison, in August.

Queensland Law Society president Ken Taylor identified key issues to be addressed by the Federal Government following the change in leadership and prior to the next federal election.

“QLS regularly speaks with members of our policy committees to gain an understanding of what lawyers see the need for in Queensland’s legal profession and the wider community,” he said. “We have identified several key areas to be addressed, including fairly resolving family law disputes; making justice more accessible for Queenslanders; resources for federal courts, tribunals and commissions; and a national plan to combat elder abuse.”

Mr Taylor said that there needed to be simplification of the family law system, including the creation of a single specialist family court with a single set of rules and forms, as well as the appointment of judicial officers with specialist family law experience.

“Family law is a key area of our justice system, with families across the state and country relying on the expertise of our

judiciary to provide them with equal and fair justice,” he said.

“Along with adequate resourcing and the right setup for the courts, there must also be additional funding injected into legal assistance so that more Queenslanders – including those from diverse or disadvantaged backgrounds – can have equal access to justice and advice.”

Mr Taylor said that access to justice was a basic right for Queenslanders, and funding for legal assistance needed to be predictable, long-term and sustainable.

“The legal assistance sector sits on a razor wire each year, waiting to hear how many crumbs will be thrown their way from the Federal Budget,” he said.

“This needs to change – we must see a commitment to certain and sustainable funding to all areas of legal assistance, including dedicated funding for Aboriginal and Torres Strait Islander legal services, community civil law, and assistance for the NDIS and seniors’ legal services.”

Mr Taylor also called for a national plan from the Australian Government to combat elder abuse, citing its devastating effects on the community.

“The incidence of elder abuse and its direct impacts upon a growing and particularly

vulnerable cohort of the community requires urgent attention,” he said. “Part of the work has already been done with the Australian Law Reform Commission’s elder abuse report, but now it’s time to implement the recommendations.

“This includes promoting and encouraging awareness and reporting, implementing policies which support older people, and immediate action with respect to abuse, harm and neglect occurring in the community.

“Proper regulation, mandatory reporting and adequate training for staff must also occur in residential aged care facilities.

“We must protect all members of our community, but particularly the vulnerable.”

Mr Taylor said that the Society would release a full list of requests from the legal profession prior to the next federal election.

“We are working closely with our policy committees, the QLS Council and our legal policy team to produce our next Call to Parties document, which sets out fundamental issues for address prior to each state or federal election,” he said.

“We look forward to releasing our next document when the next election is called.”

## Call for ‘impact tests’ on new law

The Law Council of Australia has suggested that ‘justice impact tests’ be introduced to consider the downstream impact of new laws and policies on the justice system.

The proposal was among 59 recommendations included in the Law Council’s Justice Project Final Report, which was released on 23 August at Parliament House, Canberra.

The Justice Project, which began in early 2017, is the Law Council’s national, comprehensive review into the state of access to justice in Australia for people experiencing significant disadvantage. It is one of the most extensive reviews of its type in 40 years.

Law Council President Morry Bailes said justice impact tests would prompt a whole-of-government approach when dealing with the pressures on the justice system, avoiding

unintended consequences and their often life-shattering impacts on Australians.

“Being a central foundation of our democracy, there is little government policy that doesn’t have some impact on the justice system,” Mr Bailes said. “We must ensure this impact is factored in at the very beginning of the process.

“For example, changes in government policy will often increase demand for legal assistance, heaping extra pressure on already-stretched services.

“Changes to laws and policy can also impact courts and tribunals, contributing to strains on court resources, creating lengthy delays, and increasing the time people are held on remand.”

He said justice impact tests were already used in the United Kingdom, Canada and a number of states in the United States.

Other recommendations in the final report include:

- a full review of the resourcing needs of the judicial system
- significant government investment in legal assistance services required to address critical gaps (at a minimum \$390 million a year) and ensuring future funding through an evidence-based, sustainable and stable funding model
- funding and supporting multi-disciplinary, holistic servicing models which address people’s complex legal and non-legal problems
- implementing a National Justice Interpreter Scheme
- a stronger focus on the needs of Aboriginal and Torres Strait Islander people and people in rural, regional and remote Australia.

See [lawcouncil.asn.au](http://lawcouncil.asn.au) .

## Firm insights for Indigenous students



First Nations law students from local universities attended a QLS Lawlink event hosted by MinterEllison on 20 August.

MinterEllison partners and lawyers generously provided personal insight into their daily activities, giving the students an inside look at the work undertaken in a large law firm and providing an excellent opportunity to meet members of the profession.

Lawyers at the firm also gave an overview of the recruitment process and their experiences as graduates.

QLS President Ken Taylor attended with the Chair of the Queensland Law Society Equity

and Diversity Committee, Ann-Maree David, and representatives from that committee and the Reconciliation and First Nations Advancement Committee.

QLS thanks MinterEllison partner Stephen Knight and MinterEllison staff for hosting such a successful event and for their support of the Lawlink program.

Lawlink is the QLS First Nations student liaison program, established by the Equity and Diversity Committee in 2004, with the aim of connecting Indigenous students with the legal profession.

## Justice Sofronoff to deliver Freeleagus Oration

President of the Queensland Court of Appeal Justice Walter Sofronoff will deliver the 2018 Clayton Utz Alexander Christy Freeleagus Oration on Friday 19 October.

The oration, on 'The Influence of Hellenistic Philosophy upon Christianity', will be hosted by the Queensland Chapter of the Hellenic Australian Lawyers Association at the Banco Court of the QEII Courts of Law and be followed by drinks and canapés in the Banco Court foyer.

See [hal.asn.au/QldOration2018](http://hal.asn.au/QldOration2018).

## Appointment of receiver for Herd & Janes, South Brisbane

On 2 August 2018, the Council of the Queensland Law Society Incorporated passed resolutions to appoint officers of the Society, jointly & severally, as the receiver for the law practice, Herd & Janes.

The role of the receiver is limited to taking control of the trust money held, received or receivable by the law practice for the purpose of distributing it to the entitled beneficiaries.

Enquiries should be directed to Sherry Brown or Bill Hourigan, at the Society on 07 3842 5888.

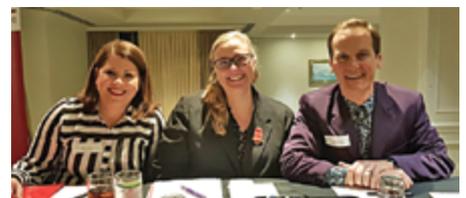
## The funny side of bankruptcy reform

Women in Insolvency and Restructuring Queensland (WIRQ) held its annual Great Debate on 9 August, debating the topical bankruptcy reform issue of 'One year is better than three'.

The affirmative team was Hanzel Hizola of Worrells Solvency Accountants, Martin Taylor of McPherson Chambers and Florence Chen of Level 27 Chambers, while the negative team included Anna Taylor of Results Legal, Petrina Macpherson of MinterEllison and Steven Hogg of McPherson Chambers.

The affirmative team were witty, entertaining and ate an onion (Martin doing his best Tony Abbott impersonation), but the negative team were victorious being that bit funnier, more fashionable and replete with musical talent (Steven played the ukulele).

Kylie Downes QC graciously judged the event and summarised each speaker's defining "arguments", while Alex Myers from event sponsor Results Legal was the emcee.



# Annual conference for QLS Senior Counsellors



Queensland Law Society Senior Counsellors came together on 31 August for their annual conference at Law Society House. Highlights from the one-day event included a Legal Services Commission presentation on the complaints process, a judicial panel discussion on advertising and bullying, and a session on mental health issues within the legal profession by QLS CEO Rolf Moses.

# QLS welcomes new Anti-Discrimination Commissioner

Queensland Law Society has applauded the Government on its appointment of long-standing member Scott McDougall as the state's new Anti-Discrimination Commissioner.

Society President Ken Taylor said Mr McDougall's extensive experience as a lawyer in discrimination and human rights law made him the perfect candidate to fill the role.

"On behalf of the profession I congratulate Mr McDougall on his appointment and think everyone will agree he is more than eminently qualified and experienced to serve in his new role," Mr Taylor said. "Mr McDougall has a great depth of experience in discrimination and human rights law and has been a very active QLS member for more than 20-years, and served on the Society's Access to Justice and Pro Bono Law Committee."

Mr McDougall was previously Director and Principal Solicitor of the Caxton Legal Centre.

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# Proper property law

This year's QLS Property Law Conference on 4 and 5 September drew 130 delegates to the Brisbane Convention & Exhibition Centre for a strong program focused on the key issues in property law, especially the challenges, benefits and future of e-conveyancing in Queensland.

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# Wage theft inquiry: Call for more judges

by Kate Brodnik and  
Pip Harvey Ross

## On Thursday 17 May 2018 Queensland Parliament announced an inquiry into wage theft in Queensland.

The terms of reference seek to highlight the incidence of wage theft in Queensland, its impact on workers and, most significantly, the effectiveness of the current regulatory framework dealing with wage theft and supporting affected workers.

Wage theft refers to the systematic and/or intentional failure by employers to pay their employees their minimum or contracted wage, annual leave, superannuation, termination and redundancy entitlements.

Our submission to the inquiry being conducted by the parliamentary Education, Employment and Small Business Committee concentrated on the steps that the Queensland Government could and should take with respect to addressing the incidence of wage theft.

Most significantly, the submission called on the Government to lobby the Federal Government for the appointment of new judges in the Federal Circuit Court (FCC). Queensland has historically had fewer FCC judges with employment and industrial relations experience when compared with other states and territories.

The significant lack of experienced judges is linked to delays in matters progressing through the registry. As the FCC is the most appropriate forum for employment law matters under the *Fair Work Act 2009*, and to promote a consistency in approach for litigants and practitioners, QLS proposed that new appointments to FCC would assist in the resolution of wage theft disputes.

However, we also acknowledged that an amendment to the *Fair Work Act 2009* to include the Industrial Court of Queensland as an “eligible state or territory court” may encourage the bringing of *Fair Work Act* claims into that jurisdiction to reduce the number of claims directed to the federal courts. We noted that the Queensland Magistrates Court and the Queensland Civil and Administrative Tribunal can also hear some employment claims and hence, should be appropriately resourced.

The submission also discussed the current potential for employees to receive monetary advances in respect of owed wages and entitlement through the Fair Entitlements Guarantee Scheme. QLS recommends that this scheme be reviewed to ensure there is appropriate access, including the ability to recover outstanding superannuation benefits.

On 16 August 2018, QLS President Ken Taylor, QLS Industrial Law Committee member Rob Stevenson and Senior Policy Solicitor

Kate Brodnik appeared at the public hearing of the inquiry. The parliamentary committee was interested in the Society’s view on whether there is an existing gap within the criminal law which, if closed, could address this issue.

In the Society’s view, the non-payment of wages or benefits is not currently an offence under the Queensland Criminal Code; however, a person could be charged with a breach of statutory duty, or in an egregious case, fraud under section 408C of the code.

Through a supplementary submission to the committee, in answer to a question on notice, we put forward the view that to criminalise wage theft was not likely to be an effective solution to the issue. Additionally, the introduction of a new criminal offence without a significant increase in court and resources would be of limited, if any, benefit to workers.

The committee is due to deliver its report to the Legislative Assembly by 16 November 2018. QLS would like to thank members of the QLS Industrial and Criminal Law Committees for their substantial work on this inquiry.

## Notices not to employ

**Magenta Jane Cameron**, a former employee of a Brisbane law practice, has authorised Queensland Law Society to publish that she will not attend or be present on the premises of any law practice in Queensland, other than for the purpose of taking legal advice for herself.

Set out below is a list of former employees of legal practices who are not to be employed unless the Council of the Queensland Law Society Incorporated gives its written consent to the person’s employment:

Frances Ann Black, Kim Butcher, Sondra Maree Burns-James, Magenta Jane Cameron, Vanessa Melanie Clark, Thomas John Cuddihy, Margaret Dacey (also known as Margaret Rowe), Bronwyn Davidson,

Michelle Wallace Dowzer (also known as Michelle Webber), Jessie Duffield, David Trevelyan Fisher (also known as Darnell David Gant), Rhonda Forde, Jack Gilroy, Lorena Se-Yoon Gower, Peta Griffiths, Caroline Grimmond, Rachel Lee Hartley, Tina Louise Heilbronn, Jodi Hitchcock, Donna Joy Hoskin, Susan Jane Howes (also known as Susan Jane Elser), Stephen Mark Jetnikoff, Ruth Brigid Kenneally, Michelle Louise Kenzler, Victoria Ann Kerr, George Latter, Linda MacDonald, Andrea Joy Marolt, Barry John Matthews, Amanda Jane McKee, Christopher McVicar, Melissa Ann Mercer, Sandra Leslie Milne (also known as Sandra Leslie Wilson), Janelle Murphy, Lisa Prinz, Janette Deborah Oakhill-Young (also known as Janette Deborah Oakmill-Young),

Tom Partos, Jason Reeves, Linda Robinson, Brooke Suzanne Schrader, Jan Scodellaro, Robyn Maree Spurway, Sina Vickers, Julie Antonia Villiers, Susan Joy Walker (also known as Susan Joy Webb and Susan Joy Williams), Lisa Ann White, Samantha Wynyard, Miranda Ziebell.

The following former employees of interstate law practices are not to be employed in legal offices unless the relevant interstate regulatory authority gives its written consent

Samantha Jane Bonham (NSW),  
Benn Reginald Day (NSW).



# New era

## FOR MIGRATION LAW PRACTICE

### Bill aims to remove dual regulation of practitioners

The Migration Amendment (Regulation of Migration Agents) Bill 2018 (the Bill), was introduced to the House of Representatives on 21 June 2017 and is currently expected to become law in certain respects from 19 November 2018.

If passed, the Bill as it stands will result in lawyers holding practising certificates becoming precluded from regulation by the Migration Agents Registration Authority, such that on or after 19 November 2018 that cohort

will be solely regulated by the relevant state or territory legal professional body when engaging in the practice of immigration law.

The purpose of this article is to briefly explore the current position with respect to dual regulation and the effect that the Bill would have on practitioners if enacted, as well as some practical considerations for those seeking to move into this practice area.

#### Background

The current scheme of regulation involving lawyers practising in the immigration law jurisdiction was implemented in 1992 by the introduction of the *Migration Amendment Act*

(No.3) 1992 (Cth) (the amending Act), which amended the *Migration Act 1958* (Cth) (the Act).

From examining the reading speeches made around the time of the introduction of the amending Act, the current regime of dual regulation of immigration lawyers was created due to an ostensible concern by federal legislators as to the viability and fragmentation of the prevailing self-regulatory models in place at that time.

The current regime governing the regulation of registered migration agents is contained within Part 3 of the Act, where it has effectively remained since 1992. In that respect, Section 280 of the Act created a



The opportunity to practise migration law will be open to all legal practitioners under proposed changes to the *Migration Act 1958*. Report by **Glenn Ferguson AM** and **Richard Timpson**.

By extension, Section 281 of the Act has continued to operate in tandem with Section 280 and, contains a restriction on charging fees for the provision of “immigration assistance” if the person is not a registered migration agent.<sup>5</sup>

### The effect of the Bill

The Bill if/when passed, will amend the Act to, amongst other things, remove lawyers from the current regulatory scheme, such that they will not be able to register with the Migration Agents Registration Authority.

The amendments will also allow eligible restricted legal practitioners to continue to be both registered migration agents and registered legal practitioners for a period of up to two years after commencement. This will effectively afford the opportunity to complete a supervised legal practice period, required for the grant of an unrestricted practising certificate.

### Commentary

Since 1992, and for the next quarter of a century or so, the dual-regulation model imposed by Part 3 of the Act was viewed by many as being unnecessary and an effective barrier to entry, requiring lawyers to pay registration fees and also hold themselves out as registered migration agents.

This has been particularly so where the legal profession has become, on any view, highly regulated with in-depth and comprehensive complaints-handling measures as well as client protections, which are arguably far more extensive than those available under the Act.

In that respect, following significant lobbying over the period since 1992 and an emerging bi-partisan political view that the current scheme needed to exempt lawyers from its operation, the Federal Government in 2017 introduced the Bill – after several years of indicating it would do so. This Bill, as outlined, will operate to cease the requirement of dual regulation such that, moving forward, a lawyer practising in the space of immigration law will not be required to be registered as a registered migration agent.

Whilst there remains a shortage of lawyers holding practising certificates who are registered as registered migration agents, it is not expected that there will be a raft of lawyers entering this practice space after 21 November 2018 due to its highly specialised and complex nature.

While opening the area of practice to the whole profession is ultimately a welcome development, it is important to note that any practitioner considering entering the immigration practice space should consider specialisation and needs to be suitably armed with a knowledge base to allow effective, meaningful and prudent practice in this often difficult and highly politicised area of administrative law.

To that end, immigration law is an expansive but ever-changing system of law governed on a primary basis by the Act as well as the *Migration Regulations 1994* (Cth) which, in terms of its sheer volume and complexity, can arguably be compared with that of federal taxation laws.

Beneath the primary pieces of legislation also sit a significant body of legislative instruments and secondary pieces of legislation, as well as policy and judicial authorities, all of which govern administrative decision-making.

Despite this complexity, the jurisdiction offers practitioners an ability to work in an area of practice which, although at times emotional, still creates huge value to clients’ lives and separately interfaces quite heavily with other areas of practice including family and commercial law and, most significantly due to the current political climate, that of criminal law.

Glenn Ferguson AM is the Managing Director of FC Lawyers and Richard Timpson is the Director and Principal Lawyer of Timpson Immigration Lawyers. Both are QLS Accredited Specialists in Immigration Law.

#### Notes

<sup>1</sup> *Migration Act 1958* (Cth) ss276, 280.

<sup>2</sup> *Ibid* s280(3).

<sup>3</sup> *Ibid* s277.

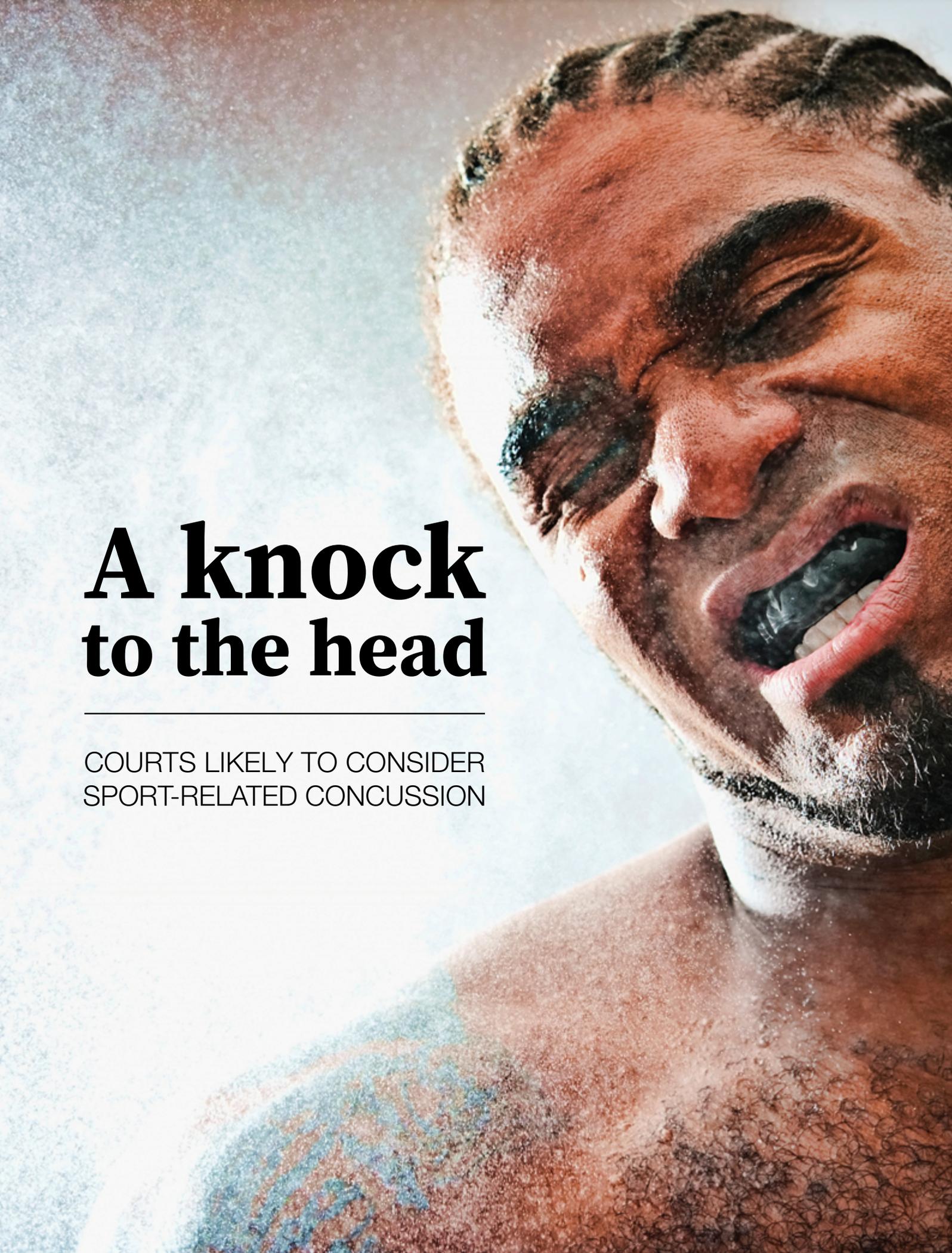
<sup>4</sup> *Ibid*.

<sup>5</sup> *Ibid* s281.

general prohibition on a person who is not a registered migration agent from providing “immigration assistance” as defined.<sup>1</sup>

Whilst Section 280(3) expressly did not prohibit a lawyer from giving “immigration legal assistance”,<sup>2</sup> the extent of that definition only carved out a limited exemption for lawyers from obtaining registration – where the extent of their assistance effectively involved judicial review proceedings relating to an immigration law decision.<sup>3</sup>

The exemption in question did not allow such lawyers to undertake or engage in a primary immigration law application, such as a visa application or visa cancellation action.<sup>4</sup>



# A knock to the head

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COURTS LIKELY TO CONSIDER  
SPORT-RELATED CONCUSSION



Sport-related concussion (SRC) is not an unfamiliar risk for Australian athletes, but it is only now that it is expected to receive significant judicial scrutiny. Report by **Annette Greenhow**.

## For decades, concerns about sport-related concussion (SRC) in Australia, particularly in combat, contact and collision sports, have been circulating in medical and scientific communities.<sup>1</sup>

SRC is not a new phenomenon that suddenly emerged following highly publicised events in the United States.<sup>2</sup> The quest to understand the scientific and medical construct of the harm of SRC has led to the convening of many medical concussion symposia and conferences, and has driven the research towards seeking to understand the nature and extent of the harm caused by SRC.<sup>3</sup>

While the medical and scientific research agendas have slowly traversed the road to discovery and increased understanding around SRC, several parties, including litigation lawyers and insurers, have been paying close attention to matters unfolding in the United States. Class action litigation alleging negligence and fraudulent concealment against the National Football League (NFL) culminated in a record-breaking \$1 billion compensation package establishing a medical monitoring fund, a monetary compensation fund and an education fund available to more than 20,000 former NFL players.<sup>4</sup>

Commentators had earlier questioned whether similar allegations or outcomes could arise in Australian sport, or whether there were unique features within the Australian legal and sports systems that offered sufficient insulation to ward off such interventions.<sup>5</sup> Several codes in Australia maintained the stance that the NFL case was distinguishable based on a couple of factors – that they had their players' health and welfare as a paramount concern, and that it was not simply a case of "concussion cousins" by way of comparison with their NFL brethren.<sup>6</sup>

SRC issues are likely to be deliberated in Australian courts in the next 12 months. Legal proceedings are pending in the Supreme Court of New South Wales and class action litigation is threatened against the Australian Football League (AFL).<sup>7</sup> The full-blown litigation process will bring into sharp focus the legal and regulatory responsibilities of key non-state actors involved in the regulation of SRC.

## The litigation landscape

### Rugby league

Several cases have been filed in Australian courts involving the sport of rugby league by professional players.<sup>8</sup> The first case was filed by James McManus (McManus) in the Supreme Court of New South Wales claiming damages for negligence against his former employer club, the Newcastle Knights (Knights).<sup>9</sup>

McManus alleges that concussive injuries were sustained during his professional career and alleges the Knights are to blame for permitting or requiring him to continue to be exposed to traumatic brain injury. He further alleges that the Knights knew the cumulative effect of concussive injuries could cause permanent impairment.

The pleadings outline the history of concussive injuries from 2012 to 2015. McManus alleges that during this time he suffered multiple head knocks and concussions, causing him to suffer cognitive and memory impairment, mood swings, headaches, anxiety, depression, lethargy and sleep disturbance. He contends that the Knights were negligent by allowing him to keep playing, encouraging him to continue playing, not keeping him away from the game for longer periods between concussions, and having unqualified people making on-field decisions.

McManus will need to satisfy the following common law elements of the tort of negligence:

- that a duty of care was owed by the Knights to McManus and that the scope of the particular duty extends to the kind of activity which led to McManus' injury
- that the Knights breached that duty, in that the conduct of the Knights was inconsistent with what a 'reasonable person' would do by way of response to the foreseeable risk
- that McManus' injuries were caused by the Knights' carelessness.

Further, McManus will need to overcome the legislative barriers contained in the *Civil Liability Act 2002* (NSW), particularly around the obviousness of the risk and whether professional rugby league qualifies as a 'dangerous recreational activity' (DRA).<sup>10</sup> In four Australian states the DRA provisions disentitle

a plaintiff from succeeding in an action where damages arise following the materialisation of an obvious risk of that DRA.<sup>11</sup>

The question of whether a professional athlete was engaged in a DRA was recently considered by the NSW Court of Appeal in *Goode v England*.<sup>12</sup> The court upheld an earlier judgment that a professional athlete was engaged in a DRA, providing an example of a 'liability-defeating rule' and disqualifying the claimant from seeking damages in negligence resulting from the materialisation of an obvious risk.

In March 2018, proceedings were issued by former Cronulla Sharks player Reece Williams against team doctor David Giveney alleging negligence in the medical management of head injuries sustained by the player during his time at the club.<sup>13</sup> In addition to the usual elements of establishing negligence, key considerations will likely include an interrogation of the nature of the relationship between the club doctor, the player and the employer club.

In several jurisdictions, the role of the team doctor has been examined in the context of balancing interests owed to players and the competitive nature of the sporting interests of the club.<sup>14</sup>

### AFL

For several years, calls have been made seeking expressions of interest from former athletes interested in exploring legal options arising from the harm associated with SRC. A website was established in 2016 and efforts have been made to galvanise support from several retired AFL players.<sup>15</sup> Media reports suggest that class action litigation against the AFL is likely to start later this year.

Proponents of the class action litigation against the AFL have been critical of the compensation regime available to retired players, arguing that there needs to be a broader-based workers' compensation system to adequately compensate and protect former players.<sup>16</sup> There currently exists a legislative gap in Australia, with professional athletes generally excluded from workers' compensation regimes and consequently entirely dependent upon privately negotiated terms under collectively bargained agreements.<sup>17</sup>

Media reports suggest that the class action proceedings are likely to be filed in the Melbourne Registry of the Federal Court and the procedural mechanisms associated with class action litigation will need to be followed.<sup>18</sup> Lawyers representing the proposed plaintiff group have suggested that the Victorian Football League/AFL “have known for 40 years about the dangers associated with allowing concussed players to continue to play” – a claim that is likely to involve questions around workplace matters involving players and the AFL.<sup>19</sup> Proceedings could fall under the Employment and Industrial Relations National Practice Area, incorporating proceedings “substantially of a character of employment and/or industrial relations”.<sup>20</sup>

## Issues for consideration

### Discovery and access to information

The litigation process enables access to information that would not otherwise be in the public domain. In the *McManus* case, the plaintiff subpoenaed medical and other records relating to incidents involving former teammates, along with the game-day diaries of former Newcastle coaches. The Knights resisted this request, filing a motion to dismiss the subpoena, alleging the documents served no “legitimate forensic purpose”. The court disagreed and ordered the release of these documents, ruling that they did serve a legitimate forensic purpose.<sup>21</sup>

The disclosure of internal information held by the Knights, its coaches and the NRL illustrates the informational function of litigation in raising awareness around SRC, including the internal management and risk classification of the issue. Further, the Federal Court ‘public interest’ policy and the online publication of pleadings on the Federal Court website could apply if the AFL class action qualifies as a ‘high profile case’, providing simultaneous and timely access to information to interested members of the public.<sup>22</sup>

### The nature of the professional sporting relationship – autonomy and responsibility

Establishing a duty of care requires careful consideration of the nature of the relationship between players, teams and governing bodies, and whether such relationship creates a legal obligation to consider the safety and interests of players when engaging in the conduct that caused the harm. The relationship in professional team sport is underpinned by contractual arrangements between the player, the club and, in some instances, a tripartite agreement including the sport’s governing body.<sup>23</sup>

It is well established that a professional sportsperson can be classified as an employee, giving rise to rights and duties based on the employment relationship.<sup>24</sup> The existence of this relationship includes a duty



to provide a safe system of work. In team sport, this would include an obligation to remove a player from a game or training when suspected of sustaining a concussion.<sup>25</sup>

The High Court in *Agar v Hyde* established that a sport’s governing body does not owe a duty to players to amend the rules of the game to make the sport safer in circumstances where it lacked any real or effective control over participants, relying heavily on principles of autonomy and responsibility of voluntary participants.<sup>26</sup> However, the court left open the possibility to later re-examine whether professional athletes as employees within an employer-employee relationship warranted a different conclusion. Should matters proceed to trial, this question is likely to arise when determining whether a cause of action exists with reasonable prospects of success.<sup>27</sup>

### The complexities of concussion and causation

A threshold issue for consideration in concussion cases is determining the nature and extent of the medical construction of the harm. Concussion is described as a “traumatic brain injury induced by biomechanical forces to the head or anywhere on the body which transmits an impulsive force to the head”.<sup>28</sup> Concussions are common in sports, particularly those sports where bodily contact is an accepted, essential or an inherent aspect of the game. The risk of sustaining a concussive injury in these sports is likely to be an obvious or inherent one. However, a key consideration in any litigation will likely focus on the nature of the harm associated with the ‘downstream’ effects of the mismanagement of the concussive injury.

The issue of causation is likely to be heavily contested. Further, the complexities associated with SRC and links to later cognitive and neurological damage ensures

that the medical and scientific evidence will be vitally important in establishing the medical construction of the harm, the classification of the risk arising from SRC and issues around causation.

### The evolving state of medical science

The evolution of and technological advances in diagnostic and evaluative tools in recognising SRC have enabled researchers and clinicians to access comprehensive methods for detection, management and prevention of SRC. Research has evolved since early diagnostic tools involved animals to study the effects of SRC and its sequelae.

Such technological and diagnostic advances establish the importance of context, particularly around the prevailing scientific knowledge at the time. On this point, it is timely to reflect upon the comments of Lord Justice Denning in *Roe v Minister of Health*<sup>29</sup> where he cautioned: “We must not look at the 1947 accident with 1954 spectacles.”

Lord Denning drew attention to the importance of appreciating the prevailing scientific knowledge at the relevant time when evaluating foreseeability of the harm. In addition to the matters discussed above, these considerations are likely to be highly relevant and will be interesting to watch unfold should matters proceed to trial.

This article was first published in April 2018 edition of the Law Institute of Victoria’s *Law Institute Journal*. Annette Greenhow is an assistant professor in the Faculty of Law at Bond University and a legal practitioner. She first published on issues involving sport-related concussion in 2011 and commenced her PhD through Monash University under the supervision of Emeritus Professor Arie Freiberg and Professor Christine Parker. She is an affiliate member of the LIV and a member of the Queensland Law Society.

## Notes

- <sup>1</sup> National Health and Medical Research Council, *Head and Neck Injuries in Football: Guidelines for Prevention and Management* (1995).
- <sup>2</sup> In *Re National Football League Players' Concussion Injury Litigation*, 961 F Supp 2d 708 (ED Pa, 2014); In *Re National Football League Players' Concussion Injury Litigation*, 307 FRD 351, 368 (ED Pa, 2015).
- <sup>3</sup> P McCrory, W Meeuwisse, J Dvorak et al. 'Consensus Statement on Concussion in Sport', 5th International Conference on Concussion in Sport, Berlin, October 2016, (2017) (51) *British Journal of Sports Medicine* 838-84.
- <sup>4</sup> Note 2 above, 307 FRD 351, 368 (ED Pa, 2015).
- <sup>5</sup> Lee Lin Chin, SBS World News Australia, 18 October 2010. A Greenhow, 'Concussion Policies of the National Football League: Revising the "Sport Administrator's Charter" and the Role of the Australian Football League and National Rugby League in Concussion Management' (2011) Art 13 *Sports Law eJournal*.
- <sup>6</sup> Greg Prichard, 'League and American Football Not Concussion Cousins, says Medic' *The Age* (online), 17 May 2012, [theage.com.au/rugby-league/league-news/league-and-american-football-not-concussion-cousins-says-medic-20120516-1yrbp.html](http://theage.com.au/rugby-league/league-news/league-and-american-football-not-concussion-cousins-says-medic-20120516-1yrbp.html).
- <sup>7</sup> Stuart Honeysett, 'Former Hawthorn premiership winner and Brownlow medallist John Platten joins AFL concussion lawsuit', *Nine Wide World of Sports*, 28 November 2017 [www.nine.com.au/2017/11/29/07/19/former-hawthorn-browlow-medallist-john-platten-joins-afl-concussion-lawsuit](http://www.nine.com.au/2017/11/29/07/19/former-hawthorn-browlow-medallist-john-platten-joins-afl-concussion-lawsuit).
- <sup>8</sup> See Adrian Prosenko, 'Former Parramatta Eels forward Brett Horsnell in landmark legal case against Club' *Sydney Morning Herald*, 3 May 2017, [smh.com.au/rugby-league/league-news/former-parramatta-eels-forward-brett-horsnell-in-landmark-legal-case-against-club-20170502-gvxj9m.html](http://smh.com.au/rugby-league/league-news/former-parramatta-eels-forward-brett-horsnell-in-landmark-legal-case-against-club-20170502-gvxj9m.html).
- <sup>9</sup> *James McManus v Knights Rugby League Pty Ltd* [2017] NSWSC 1101. See Mazoe Ford and Louise Hall, 'Knights should have retired winger McManus following head knocks, court hears' *ABC* (online), 21 June 2017, [abc.net.au/news/2017-06-21/james-mcmanus-suing-newcastle-knights-nrl-over-concussions/8638682](http://abc.net.au/news/2017-06-21/james-mcmanus-suing-newcastle-knights-nrl-over-concussions/8638682).
- <sup>10</sup> *Civil Liability Act 2002* (NSW), ss5L and 5K.
- <sup>11</sup> *Civil Liability Act 2003* (Qld) s19; *Civil Liability Act 2002* (Tas.) s20 and *Civil Liability Act 2002* (WA) s5H.
- <sup>12</sup> *Goode v Angland* (2017) NSWCA 311 (7 December 2017), Leeming JA at [180]-[211].
- <sup>13</sup> Phil Rothfield, 'Former Cronulla star Reece Williams has launched legal action against club's medical staff over treatment of his head injuries', 17 March 2018, *The Sunday Telegraph*.
- <sup>14</sup> Matthew J Mitten, 'Team Physicians and Competitive Athletes: Allocating Legal Responsibility for Athletic Injuries' (1993-1994) *University of Pittsburgh Law Review* 129. See also Scott Polsky, 'Winning Medicine: Professional Sports Team Doctors' Conflicts of Interests' (2011) 14 *Contemporary Health Law and Policy* 503.
- <sup>15</sup> [concussionmatters.com.au](http://concussionmatters.com.au).
- <sup>16</sup> Justin Talent, 'It's a Denial of their Human Rights', 23 November 2017, [sen.com.au/news/2017/11/23/its-a-denial-of-their-human-rights](http://sen.com.au/news/2017/11/23/its-a-denial-of-their-human-rights).
- <sup>17</sup> *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic.) Sch1, cl 17.
- <sup>18</sup> Michael Legg, 'National Football League Players' Concussion Injury Class Action Settlement' (2015) (10 (1)) *Australian and New Zealand Sports Law Journal*, 47, 64-65.
- <sup>19</sup> Note 7 above.
- <sup>20</sup> E&IR Practice Note 2.1 (l) or (m).
- <sup>21</sup> Note 9 above, at [18] and [21].
- <sup>22</sup> *Federal Court Rules 2011*, r2.32.
- <sup>23</sup> Standard AFL Playing Contract between the player, the club and the AFL.
- <sup>24</sup> *Buckley v Tutty* (1971) 125 CLR 353.
- <sup>25</sup> Hayden Opie and Graham Smith 'The Withering of Individualism: Professional Team Sports and Employment Law' (1992) 15 (2) *UNSW Law Journal* 313,330.
- <sup>26</sup> *Agar v Hyde* (2000) 201 CLR 552, at [82] [88] [90].
- <sup>27</sup> Hayden Opie, 'The Sport Administrator's Charter: *Agar v Hyde*' (2001)(9) *Torts Law Journal* 131.
- <sup>28</sup> AIS/AMA Position Statement November 2017, 2.
- <sup>29</sup> [1954] EWCA Civ 7 (08 April 1954).



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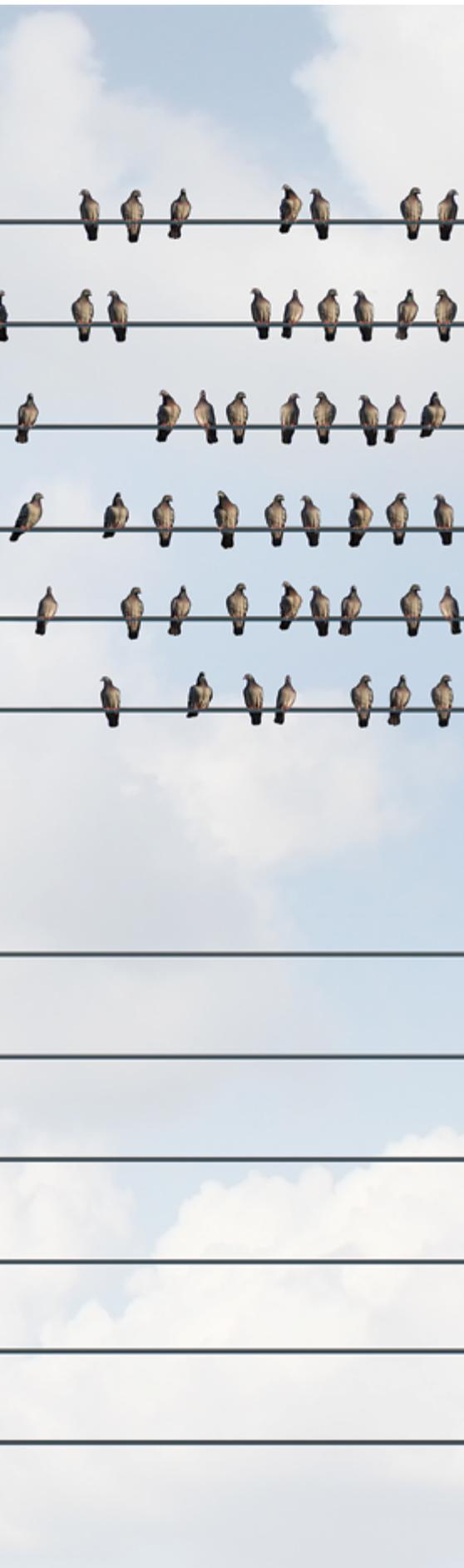
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**competing**

**claims**

ALRC considers alternatives  
to multiple class actions





With class actions now a part of Queensland legal proceedings, what will happen when the court must consider multiple actions over a single issue?

**David Hensler** suggests some possible outcomes.

### The Queensland representative proceedings regime which came into effect on 1 March 2017<sup>1</sup> mirrors that in effect in the Federal Court.<sup>2</sup>

Queensland joins New South Wales<sup>3</sup> and Victoria<sup>4</sup> in having such representative proceedings. Proceedings brought under these provisions are colloquially referred to as class actions.

The 'opt out' regime adopted in Australia permits multiple proceedings with respect to class actions arising out of the same impugned conduct.<sup>5</sup> The Australian Law Reform Commission (ALRC) is conducting an inquiry into class actions and has recently released a discussion paper<sup>6</sup> which says that, from 2005 to 2017, the number of firms acting for representative plaintiffs increased from 11 to 43.<sup>7</sup>

According to the ALRC, there are now some 25 litigation funders operating in Australia.<sup>8</sup> This leads to a reasonable inference of an increasing number of competing class action claims.

Justice Beach in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd*<sup>9</sup> enumerated the possible options available to the court when faced with multiple representative proceedings. These are:

1. Consolidation of the proceedings.
2. Staying all but one of the proceedings. (This could be on the grounds that there has been an abuse of process or the proceedings are vexatious or oppressive. Instituting more than one class action based on the same impugned conduct does not necessarily of itself mean the duplicate proceedings are an abuse of process, vexatious or oppressive.<sup>10</sup> Alternatively, the courts, both state and federal, could stay proceedings in exercise of their inherent or implied jurisdiction,<sup>11</sup> or enjoin the proceedings in equity.)<sup>12</sup>
3. Making what is colloquially known as a 'declassing' order.<sup>13</sup>

4. Making an order closing the class in all but one of the proceedings, leaving that one proceeding as open class, and having a joint trial of all proceedings. (A class action may be 'open' or 'closed'. The group members of an open class include all persons who meet the class criteria irrespective of whether they have registered with any law firm or litigation funder. Any settlement or judgment binds all, whether registered or not. When the class is closed only those who have registered with a particular law firm/ litigation funder are entitled to the fruits of any settlement/judgement. Excluded group members may still bring their own claim. A class closure order is usually made to facilitate settlement. Such orders require class members to come forward and register in order to participate in a future settlement, with all class members bound into the settlement.<sup>14</sup> It would appear that courts should be cautious before making a class closure order that, in the event settlement is not achieved, operates to lock class members out of their entitlement to make a claim or share in a judgment.)<sup>15</sup>

5. Having a joint trial of all proceedings with each left as constituted.
6. Adopt a 'wait and see' approach.

In the case before Beach J, two firms had instituted separate shareholder class actions against the respondent, Bellamy's. The proceedings:

- were commenced within a short period of time from each other
- were each supported by a litigation funder
- each had a significant number of putative group members signed up (1000 and 1500)
- each had similar if not identical subject matter and causes of action, and effectively covered the same period of time
- were both open class proceedings, subject to a carve out in the case of the proceedings commenced second in time of those signed up to the earlier proceedings.

After a detailed consideration of the options, Beach J determined the appropriate course was to permit one proceeding to remain open and to close the other. Those in the closed class would of course be excluded from participation in the open class proceedings. His Honour considered the funding arrangements of the proceedings he elected to leave open were less opaque and more certain than the other, and this informed his choice.<sup>16</sup>

His Honour made other relevant observations as follows:

- Absent a substantial number of group members signed up to litigation funding and retainer agreements, he would have had no hesitation in staying one of the proceedings.<sup>17</sup>
- Where one of the proceedings involved a very substantial number of group members signed up to funding agreements and the other did not, he would have, all other things being equal, been inclined to stay the proceedings with the lesser numbers.<sup>18</sup>
- Being first in time does not, and should not, give an advantage, although significant delay may be a factor to be considered.<sup>19</sup>
- It is not appropriate at an early stage to compare the terms of possible competing common fund order scenarios.<sup>20</sup>

In *GetSwift*,<sup>21</sup> a decision handed down in the Federal Court in May 2018, Justice Lee had to deal with three overlapping open securities class actions, each being run by a different set of solicitors with different litigation funders. These can conveniently be referred to as the Perera, McTaggart and the Webb proceedings.

He comprehensively assayed the law and practice in Australia and North America with respect to competing class actions.

He said:

“What requires present attention is how the Court deals with competing commercial enterprises which seek to use the processes of the Court to make money and the role of the Court in ensuring the use of those processes for their proper purpose and informed by considerations including: (a) the statutory mandate...to facilitate the just resolution of disputed claims according to law and as quickly, inexpensively and efficiently as possible;<sup>22</sup> and (b) the furtherance of the Court’s supervisory and protective role in relation to group members.”<sup>23</sup>

With this purpose in mind, His Honour noted that “[e]ach instance of competing class actions needs to be managed by reference to the bespoke circumstances before the Court”.<sup>24</sup>

Lee J accepted Beach J’s formulation of the courses open to him to deal with the competing claims.<sup>25</sup>

After an examination of each of the Perera, McTaggart and Webb proceedings, and the arguments advanced in support of them, Lee J considered that the Webb proceedings were the most advantageous for group members. He opted to resolve the competing claims by staying the Perera and McTaggart claims.

His Honour observed that:

“...it is, of course, uncontroversial the Court has power to stay a proceeding which constitutes an abuse of process; and debate focused on whether the existence of a competing class action can provide a valid basis for finding that an abuse of process exists as the precondition to the imposition of a permanent stay.”<sup>26</sup>

Lee J discussed abuse of process in some detail<sup>27</sup> and noted that abuses of procedure usually fall into one three broad categories, namely, if the court’s procedures are invoked for an illegitimate or improper purpose,<sup>28</sup> if the use of the court’s procedures is unjustifiably oppressive to one of the parties or vexatious, or if the use of the court’s procedures in the manner contemplated would bring the administration of justice into disrepute. He also noted the High Court’s observations that the categories in which abuse arises are not closed, and that caution should be exercised when staying proceedings regularly commenced.

He said:

“If one starts from the premise that the individual claims of Mr Perera and the McTaggart applicants which are being properly pursued can still be pursued,<sup>29</sup> to allow duplicative open class proceedings to proceed when they perpetuate unnecessary multiplicity are not otherwise an appropriate vehicle in enforcing the substantive rights of the group members (being the very representative purpose of Part IVA proceedings), would bring the administration of justice into disrepute. This is particularly the case when to allow such a state of affairs to continue would be to allow the use of the processes of the Court in a way which would be unfair to *GetSwift* by countenancing the conduct of a proceeding being conducted contrary to the overarching purpose (including by unnecessarily increasing costs) and also unfair to group members who will likely have to bear those increased costs, indirectly, through any resolution of their claims. All these considerations combine in the bespoke circumstances of multiple open class Part IVA proceedings to make a continuation of the Perera Proceeding and the McTaggart Proceeding abusive.”<sup>30</sup>

In the event there was no power to stay proceedings, His Honour said he would have declassified proceedings under s33N(1)(c) of the *Federal Court of Australia Act 1976* – this

provision empowers a court to declassify if it is in the interests of justice that a representative proceedings will not provide an efficient and effective means of dealing with the claims of group members. (For Queensland, see *Civil Proceedings Act 2011*, s103K(1)(c).)

As noted, each case “needs to be managed by reference to the bespoke circumstances before the Court”.<sup>31</sup> So, for example, Ball J of the Victorian Supreme Court in *Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited*<sup>32</sup> ordered that two overlapping class actions be heard together, with the evidence in one to be the evidence in the other.

In *Cantor v Audi Australia Pty Limited (No.2)*,<sup>33</sup> Foster J of the Federal Court permitted competing class actions to proceed in parallel, leaving further consideration until after delivery of the approved opt-out notices. *TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (administrators appointed); Nakali Pty Ltd v SurfStitch Group Ltd (administrators appointed)*<sup>34</sup> was a case of overlapping class actions in which one claim was against the company and a former officer and the other just against the company. The company went into administration, resulting in a stay of proceedings against it. Stevenson J of the New South Wales Supreme Court allowed the class action to continue against the former officer.

Overlapping competing class actions will, in the absence of statutory intervention, continue to be a feature of the class-action landscape and will continue to pose challenges for the courts and the parties. Defendants will continue to be vexed by multiple proceedings and the inevitable extra costs; plaintiffs by uncertainty as to the ultimate fate of their proceedings; and courts by complex case management issues.

The ALRC in its discussion paper contends that multiple class actions undermine the economy and certainty that the class action regime was designed to provide.<sup>35</sup> It proposes, as a matter of policy, that all class actions be open, and, subject to a power to order otherwise in appropriate situations, all but one competing action should be stayed.<sup>36</sup> Such a policy would require the court to make a choice between competing claimants. Factors to be considered when staying representative proceedings have been identified by Lee J in *Perera*<sup>37</sup> and by the ALRC.<sup>38</sup> Factors to be taken into account include:

1. the experience of the legal practitioners involved in each of the actions
2. the resources made available by each firm of solicitors and their accessibility to clients
3. the state of preparation of each proceeding



4. the position offered by each funder respecting security for costs and the resources available to fund the costs of the applicant and adverse costs orders
5. the respective merits of the common issue cases as pleaded or as foreshadowed
6. the respective strength of the individual cases of the representative applicants
7. the decision or choice of some group members to enter into funding agreements
8. the relative numbers of the funded group members
9. the estimated costs deposited to by each of the plaintiffs'/applicants' solicitors
10. proposals made or adopted by the plaintiffs/applicants to reduce and control costs, including any limits placed on costs
11. proposals made or adopted by the plaintiffs/applicants to reduce and control expert costs
12. the existence of any significant differences in the scope, causes of action or the case theories proposed to be advanced
13. the case management objectives of Part VB of the *Federal Court of Australia Act 1976* (For Queensland see *Uniform Civil Procedure Rules 1999*, Reg.5.)
14. whether allowing more than one open class proceeding to progress would be unjustifiably vexatious to the respondent
15. undue delay by or dilatoriness of any applicant
16. if the claim of any individual would render any of the proceedings unsuitable for the resolution of common issues at trial
17. concern about the terms and effect of any funding agreement.

#### Notes

<sup>1</sup> See Part 13A, sections 103A-103ZC of the *Civil Proceedings Act 2011*.

<sup>2</sup> *Federal Court of Australia Act 1976*, Part IVA, ss33A-33ZJ.

<sup>3</sup> *Civil Procedure Act 2005*, Part 10, Div.2, ss155-176 (NSW).

<sup>4</sup> *Supreme Court Act 1986* Part 4A ss33A-33Y (Vic.).

<sup>5</sup> See Finkelstein J's discussion of the history and nature of Part IVA proceedings in *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061 (19 July 2007).

<sup>6</sup> Australian Law Reform Commission, 'Inquiry into Class Action Proceedings and Third Party Litigation-Funders', Discussion Paper No.85 (2018).

<sup>7</sup> *Ibid* 41-42, [2.24].

<sup>8</sup> *Ibid* 51, [3.30].

<sup>9</sup> [2017] FCA 947 (18 August 2017) [36].

<sup>10</sup> *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017). But see *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56 (5 February 1999) where Merkel J held it was vexatious and oppressive for a respondent to be subject to two class actions and consolidated the proceedings with both sets of solicitors to be on the record in the consolidated proceedings.

<sup>11</sup> *Perera v GetSwift Limited* [2018] FCA 732 (23 May 2018); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947. (18 August 2017); *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; (2006) 227 ALR 425; (2006) 80 ALJR 1100 (14 June 2006).

<sup>12</sup> *Perera v GetSwift Limited* [2018] FCA 732 (23 May 2018). [350].

<sup>13</sup> This is an order made under s103K of the *Civil Proceedings Act 2011* (Qld), or s33N of the *Federal Court Act 1976* which permits a court to order that a proceeding no longer continue as a class action if it considers it is in the interest of justice that this be so if one of the five specified criteria is met. If such an order is made the 'declassified' proceeding continues as a claim made solely by the representative plaintiff. Arguably, such an order could be also made in exercise of the court's power under s33ZF of the federal legislation, or s103ZA of the Queensland Act.

<sup>14</sup> The procedure was sanctioned by the Full Federal Court in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98 (20 June 2018) [71]-[80].

<sup>15</sup> *Ibid* [76].

<sup>16</sup> *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) [74]-[88].

<sup>17</sup> *Ibid* [96].

<sup>18</sup> *Ibid* [97].

<sup>19</sup> *Ibid* [103].

<sup>20</sup> *Ibid* [99]. A common fund order is one in which the class remains open but requires all class members to contribute an equal percentage of any judgment or settlement amount to the party covering the costs, regardless of whether they have signed an agreement or retainer.

<sup>21</sup> *Perera v GetSwift Limited* [2018] FCA 732 (23 May 2018).

<sup>22</sup> See the philosophy and the overriding obligation of the parties and the court expressed in Rule 5, *Uniform Civil Procedure Rules 1999* (Qld).

<sup>23</sup> *Perera v GetSwift Limited* [2018] FCA 732 (23 May 2018). [3].

<sup>24</sup> *Ibid* [6].

<sup>25</sup> *Ibid* [105].

<sup>26</sup> *Ibid* [109].

<sup>27</sup> *Ibid* [109]-[124].

<sup>28</sup> In *Melbourne City Investments Pty Ltd v Myer Holdings Limited* [2017] VSCA 187 (20 July 2017) the Victorian Court of Appeal held a class action was commenced with the predominant purpose of generating income from the proceeding itself, and not to seek compensation for any wrong done, nor to assist the group members by acting as lead plaintiff; therefore, it was an abuse of process.

<sup>29</sup> Because they are already included in the Webb proceeding, which allows for vindication of their personal claim without multiplicity.

<sup>30</sup> *Perera v GetSwift Limited* [2018] FCA 732 (23 May 2018) [345]-[346].

<sup>31</sup> *Ibid* [6].

<sup>32</sup> [2016] NSWSC 17 (5 February 2016).

<sup>33</sup> [2017] FCA 1042 (1 September 2017).

<sup>34</sup> [2017] NSWSC 1755 (14 December 2017).

<sup>35</sup> Above n6, 112, [6.41].

<sup>36</sup> Above n6, 109, [6.27]-[6.54].

<sup>37</sup> *Perera v GetSwift Limited* [2018] FCA 732 (23 May 2018). [169].

<sup>38</sup> Above n6, 114-115, [6.51].

# Subpoenas go digital

## Key amendments to the UCPR

Changes to the *Uniform Civil Procedure Rules 1999* (Qld) cover digital subpoenas and electronic filing. Report by **Brent Reading**.



### Amendments to the *Uniform Civil Procedure Rules 1999* (Qld) came into effect on 24 August 2018.

The amendments generally concern subpoenas and the electronic filing of documents. This article provides a summary of the amendments:

- a. R414(2A) has been inserted and provides that a subpoena may be issued by a court electronically. The electronic filing, issuing and service of documents (including subpoenas) is discussed below.
- b. R415(4) has been inserted and clarifies that a subpoena must state “the last date for service of the subpoena”. The last date for service is defined by r415(6) as either the date for service fixed by a court or the date that is five days before the earliest date that the person to whom the subpoena is directed is required to comply with the subpoena. However, pursuant to the new r415A, a party on whose behalf a subpoena was issued may give written notice to the person to whom the subpoena is directed of a different date or time to that stated in the subpoena to give evidence, produce documents, or both. If such notice is given, the date specified in that notice will become the relevant date for the return of the subpoena.
- c. R420A has been inserted and provides that if a subpoena requires a person to produce a document, that person may comply with the subpoena by producing a copy of the document (unless the subpoena specifically states that the original document must be produced). A copy of the document(s) can be delivered in hard copy or electronically to the registry (discussed below).
- d. R421 has been repealed and replaced with a new r421. The new rule provides that service of a subpoena can be affected in the normal way (that is, under parts 2, 3, 4 and 5 of Chapter 4) or, alternatively, if a subpoena is issued electronically, it can be served by email to the person it is directed to. However, prosecution for non-compliance with a subpoena served via email requires the prosecuting party to establish that the person to whom the subpoena was directed in fact received the subpoena and “has actual knowledge of the subpoena”.
- e. R691(2) and Schedules 1 and 2 have been amended such that the scale of costs for the Supreme Court and District Court are consolidated within Schedule 1. Schedule 2 now sets out the scale of costs for Magistrates Courts proceedings. The specific costs listed in Schedule 1 do not differentiate between the Supreme Court and District Court. There are separate cost categories for the review and disclosure of documents filed electronically.
- f. R691(8) has been inserted and provides that costs are to be assessed in accordance with the scale of costs in force at the time the costs were incurred. This amendment aims to assist in clarifying which scale of costs applies to any cost assessment.
- g. R969A has been inserted and describes that:
  - i. Court documents may be filed electronically.
  - ii. The registry can apply the court’s seal to any document filed electronically.
  - iii. A document will be taken to be filed on the day that it is filed if the whole of the document is received (electronically) by the registry by 4.30pm on that day.
- h. R975A has been inserted and describes particular rules that apply to the electronic filing of documents. The new rule describes that:
  - i. An originating process filed electronically must be signed unless “it is not reasonably practicable” to do so. However, the rule states that it is reasonably practicable for documents which are scanned and uploaded to the registry to have been signed.
  - ii. An order of the court can be filed electronically and, thereafter, sealed by the registrar electronically.
  - iii. Amendments to documents filed (such as pleadings) can also be filed electronically. The rule contemplates that the amendments be made in the ordinary way and that the amended document be scanned and uploaded to the registry.
- i. R975C has been inserted and provides that any document that is sworn or affirmed may be electronically filed provided that it is an “imaged document” (that is, a scanned version of the document) and is an approved electronic file format (which includes PDF, JPG and HTML). The original copy of the sworn or affirmed document must be retained by the party or solicitor who filed the document for seven years from the date of filing and must be produced, if required to do so by the court.

Practitioners are encouraged to contact any Queensland Courts registry for details regarding how court documents can be filed electronically in accordance with the new and amended rules discussed above.

Brent Reading is a barrister at Northbank Chambers, Brisbane.

# Courtesy – let's avoid informality

by Stafford Shepherd



When we write a letter, email or any written communication to a colleague for a client, we need to be mindful that such communication could be tendered at some time as evidence in proceedings.

It is best for us to avoid familiarity and informality. For instance, unless a colleague invites us to use their given name, we should continue to use salutations such as 'Dear Colleague' or 'Dear Mr X' or 'Dear Miss/Ms Y', until invited by our colleague to address them by their given name or the circumstances are such that the use of the given name is acceptable to all parties. And avoid references to personal issues or expressing a personal opinion.

Emails have aided in getting our client's concerns across quicker, but this should not be seen to mean that a less formal approach can be adopted. Statements about going to the pub, or 'thanking God it is Friday' should be reserved for less formal communications.

When we write a letter or send an email addressed to any person (whether client, colleague or a third person), it should be courteous and avoid offensive language. Being too familiar or informal can be a disservice to the client and may lead our client to question whether we are looking after their best interests.

When dealing with colleagues, we must take all reasonable care to maintain the integrity and reputation of the profession by ensuring that our communications, whether they are written or oral, are courteous.

Before sending the letter or email, think about what a court or your client may think if that document is tendered in evidence.

More information on this and related topics is available online from the QLS Ethics and Practice Centre, [qls.com.au/ethics](http://qls.com.au/ethics).

Stafford Shepherd is the director of the Queensland Law Society Ethics and Practice Centre.

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# Efficient conduct of civil litigation

## New practice direction aims to reduce costs and time

On 17 August 2018, the Chief Justice of the Supreme Court issued Practice Direction Number 18 of 2018, which contains a number of requirements for practitioners acting for litigants in the Supreme Court.

The practice direction can be found at [courts.qld.gov.au](http://courts.qld.gov.au) > Court users > Practitioners > Practice directions > Supreme Court.

This article highlights some of the important features of the practice direction.

### Management of documents

#### Document plan

The practice direction requires that, as soon as reasonably possible after the filing and service of a claim, and prior to filing a notice of appearance and defence, the parties are to confer and agree on a basic plan for the management of documents which deals with at least the following:

- a. a document management protocol (including the agreed format(s) for documents), and
- b. the provision of documents referred to in the pleadings.

A form of an example document plan is contained in an appendix to the practice direction.

The document plan is to be revised and developed as soon as reasonably possible after pleadings close, and as the proceeding progresses.

As part of an agreed document plan, the parties should focus at an early stage on undertaking reasonable searches with a view to locating and exchanging documents that are necessary to resolve the matter promptly and with a minimum of expense.

#### Exchange of critical documents

Parties should exchange at an early stage of a proceeding, and as soon as possible after the close of pleadings, a limited number of critical documents, with a view to facilitating the early resolution of the matter.

Critical documents are those documents in the possession or under the control of a party of which the party is aware after a reasonable search, and which are likely to be tendered at trial and to have a decisive effect on the resolution of the matter. They include documents that either support or are adverse to a party's case.

#### Resolution bundle

The parties should consider the creation of a resolution bundle, ideally in a simple, electronic form, which contains only those documents that are likely to be beneficial in attempting to resolve the case and that are likely to have a decisive effect upon the resolution of the matter.

This resolution bundle:

- a. may be supplemented with further essential documents following disclosure and other processes or a specific court order
- b. should be reduced in size once issues are resolved or narrowed
- c. should contain no more documents than are necessary to resolve the matter at that stage of the proceeding
- d. should be the basis for resolution of the matter at mediation or trial.

#### Disclosure generally

Litigants must utilise technology where possible to achieve efficiency. For example, litigants should investigate the use of technology to create and exchange electronic lists of documents, inspect documents and other material, prepare for trial and present evidence at trial.

#### Conferences to narrow the issues in dispute

As early as reasonably possible, or as directed by the court, the parties should confer for the purpose of resolving or narrowing the issues in dispute, identifying the real issues that remain in dispute, and agreeing steps for the just and expeditious resolution of those issues at a minimum of expense.

The legal practitioners with the conduct of the trial, and each party or a representative of each party who is familiar with the issues in dispute, should attend the conference, unless excused from doing so by the court.

Such conference may be in person, by video-conference or by telephone conference.

Prior to the conference, the parties are expected to agree a short agenda.

Part or all of the conference may be held 'without prejudice' by express agreement of the parties.

The parties may agree to the appointment of an independent person to facilitate the conference.

#### Avoiding the cost of proving facts and documents which should not be in contention

Parties are expected to adopt a sensible and cost-effective approach to not requiring proof of matters which should not be in serious contention. A failure to do so may result in adverse costs orders against a party or a practitioner.

The manner in which facts which are not in contention are recorded should be agreed by the parties. For example, a party may prepare a list of facts or matters which will not be disputed at the pending trial.

#### A short summary of the issues to be tried

The pleadings remain the basis upon which the issues to be tried are formally identified. However, given the complexity of many pleadings and as an aid to efficient court management of cases, the parties should prepare a list of the real issues in dispute. The list should be concise, and in a form that is most useful to the court. It may contain cross references to pleadings.

If the parties agree that certain matters have become 'non-issues', then the issues that are not to be tried should be identified and the resolution of those issues recorded in a suitable form (either in a formal amendment to pleadings or some other clear form).

If the parties are unable to agree about the real issues which remain in dispute, then they should seek to resolve any misunderstanding by requesting a case conference before the Resolution Registrar or a review/directions hearing before a judge.

A new Supreme Court of Queensland practice direction features significant changes to procedure with the goal of reducing the time taken and cost of civil matters. Report by **Kylie Downes QC**.



### Trial plans and readiness for trial

As early as reasonably possible in the proceeding, the parties must attend a conference for the purpose of developing a basic plan for the trial of the proceeding, and thereafter submit to the court a basic trial plan which contains the estimated duration of openings; the estimated duration of each witness's evidence; the sequence in which witnesses will be called; the calling of expert witnesses (if any); the calling of witnesses by telephone or video-link; the estimated duration of submissions, and the estimated duration of the trial.

Such a conference is to be attended by the counsel or solicitor with the responsibility for the conduct of the trial. The parties should critically consider the need to call and cross-examine certain witnesses if matters not in serious contention can be proven in some other form or admitted.

Such conference may be in person, by video-conference or by telephone conference.

The parties should agree, if possible, whether the evidence expected to be given by a witness should be previewed in a brief summary of evidence or some other form.

If the parties are in substantial disagreement about whether a matter is ready for trial or about the expected duration of a trial, they may request a case conference before the Resolution Registrar or a review/directions hearing before a judge.

If the parties agree about the directions which are necessary for the matter to be set down for trial and for the efficient conduct of trial preparation and the trial, then proposed directions should be submitted in conjunction with a trial plan. This may permit trial directions to be made 'on the papers' by a judge or registrar.

### Court intervention and supervision

Proceedings which are anticipated to require a significant level of court supervision should be placed on the Supervised Case List.

Where parties are unable to resolve significant differences about the conduct of a proceeding despite having conferred, appropriate use should be made of case conferences before the Resolution Registrar and reviews before a Supervised Case List judge. Otherwise, the issue for judicial resolution having been defined, an application for specific orders or an application for directions should be made in the Applications List or, by prior arrangement with the associate to the judge allocated to try the proceeding.

Kylie Downes QC is a Brisbane barrister and member of the *Proctor* Editorial Committee.

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# Standing out in a crowded market

## The importance of personal branding for early career lawyers

With the rise of social media, ecommerce, and the outsourcing of legal work, personal branding is becoming increasingly important for lawyers, regardless of whether you work in a top-tier or micro firm.

Consider your own behaviour, for instance. What do you do when a friend recommends, for example, a new restaurant or hairdresser? I suspect that you Google the business or person, look at their social media channels and read their reviews before you go or make an appointment. This is no different for a client who is looking for a new lawyer or has been referred to a lawyer.

As lawyers, we tend to hide behind our legal knowledge and experience. We find comfort in what we know and the practice areas in which we can demonstrate our expertise. However, whilst having the legal knowledge is important, stop and consider what would make a client or a partner (think promotions) choose you from an array of other lawyers who have the same experience and legal knowledge in your practice area?

I often hear colleagues say that they “don’t have time to market themselves”, or “I went to law school to be a lawyer, if I wanted to be a marketer then I would have done a marketing degree”. The reality is that sometimes our experience and knowledge of the law is simply not enough; we may need that competitive edge.

If you want to stand out, win work and new clients, get the promotion that you have been working towards, or be offered partnership, then you need an ‘X factor’ – something that distinguishes you from the rest.

Building a personal brand and client development is challenging, even for those of us who have been practising law for a long time; it’s obviously a far more daunting task when you are starting out as an early career lawyer. To help you build your personal brand, I’ve compiled four tips that I have used throughout my early career to shape my personal brand and increase my client development skills.

### Tip 1: Set the foundation of your personal brand

It’s never too early to establish the foundation of your personal brand. Your personal brand is what separates you from everyone else. Try to start thinking of yourself as not just an employee, but also as a unique brand.

The first step to creating your personal brand is to organise your thoughts and vision. What area of law do you focus on or hope to focus on? What are your interests within your preferred area of law? If you work in a team, think about the skills you bring to the team. What do your allocated tasks usually consist of?

To visualise and understand your personal brand, ask yourself the following questions and write down your answers:

1. What am I good at?
2. What have I done that I am proud of?
3. What are my values and ideal traits?
4. What am I passionate about?
5. What am I known for?

There you have it; your answers are the foundation for your personal brand.

The second step is to write a sentence or a tagline for how you would introduce yourself to somebody you had never met in a room full of lawyers, often referred to as your ‘elevator pitch’. Your automatic reaction will probably be to state your name and the area of law you practise in, for example: “Hi, my name is Bianca Stafford and I’m a wills and estates lawyer.”

This type of generic introduction would not set me apart from the other wills and estates lawyers in the room. However, if I were to say, for example, “Hi, my name is Bianca Stafford and I assist everyday people with the transition of their wealth to the next generation”, this type of introduction does not only set me apart, but is also likely to spark further questions, interest and conversation.

### Tip 2: Networking

‘Networking’ is a dreaded word that makes most early career lawyers shudder. The reality is, however, that the more networking you do, the easier it gets. Most of the time, the daunting thought of going to a networking event is based on a hypothetical scenario we play out in our mind. Don’t overthink it, just be yourself. Usually everyone is there for the same reason – to network – so people are generally happy to have a chat.

To build your personal brand, try to go to as many networking events as you can. Get your name, face and, most importantly, what you do (using your elevator pitch) out into the world. If you get stuck on topics to talk about, revert back to the basics and ask people about themselves. For example, where they work, how long they have been there, what they like most about their job. People generally love to talk about themselves.

I know this might seem blatantly obvious, but when people are talking to you, make a conscious effort to listen, *really* listen. This is sometimes difficult when you are nervous or are worried about what else is happening in the room. Give the person you are talking to your complete attention.

Relationships and trust take time to build and develop; so don’t leave a networking event feeling deflated if you didn’t make a connection or obtain a referral source. If you do make a connection at a networking event, it is always nice to follow up with a short email after the event, letting them know that you enjoyed meeting them and you would be keen to catch up for a coffee/chat again soon – and don’t forget to add them on LinkedIn.



by Bianca Stafford

### Tip 3: Start saying 'yes' and venture outside your comfort zone

Unexpected opportunities do not just simply fall into our laps; you have to go out and find them. Although you probably feel content within your comfort zone, venturing outside of it can open you up to a variety of opportunities.

To help build your personal brand, say 'yes' to any public-speaking opportunities that may arise, whether it be at your old university, within your firm, at a business event or seminar. Again, like networking, the idea might be daunting at first, but the more public speaking you do the less scary it will be, and it is a great way to get your personal brand out there.

Say 'yes' to joining a committee or volunteering at your local community legal centre; these centres are always in need of help. Giving back to the community is not only fulfilling, but a great way to show people what you are interested in and passionate about. All of this assists in developing your personal brand.

We often find it hard to break away from our routines or try something new because we fear that we will not enjoy it or will fail. However, the more you say 'yes', the more you will face those fears and insecurities head-on.

### Tip 4: Build your online presence

Not only does writing blogs or articles increase traffic to your firm's website, it is a great way to share your knowledge and skills to the world at large and will help identify you and your firm as leaders in the profession. It also helps build trust; the more well-versed you are in your field, the more likely people will trust you to provide them with advice.

There are so many great platforms to share blogs, articles and videos such as personal websites, LinkedIn, Facebook and Instagram. Each platform has its own purpose and the type of content you publish should depend on the audience. For example, I use LinkedIn to post blogs or articles that I have written that may be of particular interest, not necessarily to private clients, but to other professionals such as accountants and financial planners. In my area of law, especially estate planning, accountants and financial planners are a main source of referrals.

I have recently created a professional Instagram account called the @thenextgenlawyer and while I don't have hundreds of followers, I have noticed fairly quickly the impact Instagram has had in boosting my personal brand. I use Instagram to post short reminders or tips on, for example, 'When to review your will' and 'How to choose the right guardian for your children', usually with a link back to my blog in my bio for further content and information. Instagram is also a great way to show the world a glimpse of your personal life (whilst remaining professional), which in turn makes you more relatable and allows people to connect with you on a different level.

Lastly, I post all of my blogs, articles, and videos on my personal website – [biancastafford.com](http://biancastafford.com). My website is a central point where all of my blogs, articles and videos are consolidated. I like to think of my website as a starting point for clients to obtain general information about legal processes they may not be familiar with, for example, 'What is probate?', 'Am I entitled to see the will?', 'What happens to my super when I die?'.

Please bear in mind that, if you choose to start a personal blog or Instagram page, you must commit to it in order to reap the rewards. This does not happen immediately and it is sometimes hard, especially when you are busy. It is important, however, to keep the content rolling so that your brand continues to grow and so do the benefits.

If there are times when you are quiet in the office, make the most of it and write additional content to be posted at a later date. Most importantly, write about what you are passionate about; it is always more enjoyable and your passion, skills and experience will show through your writing.

### Conclusion

As lawyers, we are often so consumed by deadlines, professional development, budgets and billables, that we sometimes fail to recognise and consider how the work and clients are actually coming through the doors.

Due to the impact technology is said to have on our practice, personal branding is now more important than ever. However, building your personal brand does not happen overnight, it takes time, dedication and persistence. As an early career lawyer, there is no better time than the present to leverage your qualities to achieve your goals.

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Frances Stewart (Frances.Stewart@hyneslegal.com.au) and Adam Moschella (Adam.Moschella@justice.qld.gov.au). Bianca Stafford is an associate at Miller Harris Lawyers.

# Genome editing – the new legal frontier



The development of gene-editing CRISPR/Cas9 technology is arguably the most significant biotechnological discovery of the century.

Able to cut and splice any DNA sequence,<sup>1</sup> CRISPR/Cas9 technology possesses the potential to revolutionise human development. It is therefore capable of being used to literally redesign humans at the genetic level.

The considerable commercial value of such CRISPR technology has resulted in lengthy disputes over the intellectual property rights to it. At the same time, the ability to make genetic alterations to living cells, including human embryos, has given rise to vexed ethical questions.

The legal community has a critical role to play in directing the regulation and responsible use of this powerful technology.

## What is CRISPR?

CRISPR, which stands for Clustered Regularly Interspaced Short Palindromic Repeat, is naturally found in bacterial cells. The 'CRISPR system' captures small segments of invading foreign DNA from viruses and inserts it between CRISPR sequences as template DNA. When bacteria later encounter foreign DNA that matches the sequence of template DNA, the CRISPR-associated (Cas) protein family targets are activated and degrades the foreign DNA by slicing it into smaller, inactive pieces.

In 2012, a group of scientists from the University of California (UC) harnessed the naturally found CRISPR system to develop a bacterial CRISPR/Cas9 system that could slice DNA at a specific location pre-determined by scientists.<sup>2</sup>

Researchers from Harvard Medical School and the Massachusetts Institute of Technology built upon this work to engineer a CRISPR/Cas9 system that could target and edit a genomic sequence in eukaryotic cells, such as those found in humans.<sup>3</sup> The edited sequence could, as one of many possibilities, contain a new, more desirable gene.

While there are several existing gene-editing technologies, such as Zinc Finger Nucleases and TALEN, CRISPR/Cas9 is significantly more effective and efficient.<sup>4</sup> Accordingly, there is substantial commercial value in the development and use of CRISPR/Cas9 technology.

## Who owns CRISPR?

The commercial value of CRISPR/Cas9 technology has led to a dispute over the intellectual property rights to it.

Several companies have been formed to attempt to exploit CRISPR technology to create novel medicines. Venture capital firms, pharmaceutical companies and public stock offerings have invested over \$1 billion in CRISPR companies; Google Ventures alone has invested \$120 million.<sup>5</sup>

The Broad Institute, a joint venture between Harvard University and the Massachusetts Institute of Technology, licensed the CRISPR/Cas9 technology that it developed to partners in a variety of fields with the aim of developing improved crops and livestock, industrially-manufactured chemicals and better animal models to interrogate human disease.<sup>6</sup>

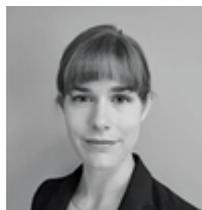
Two institutions, the UC and Broad, and scientist Emmanuelle Charpentier, currently claim intellectual property rights over CRISPR. In 2012, UC filed a US patent application on CRISPR/Cas9 gene-editing technology as applied to all cell types. Broad also filed several accelerated patent applications in 2012, which were limited to the eukaryotic system.<sup>7</sup>

In 2015, UC requested that the Patent Trial and Appeal Board (PTAB) declare a patent interference between UC and Broad's claims to CRISPR to determine which party was entitled to the rights over several overlapping elements of the CRISPR/Cas9 systems. This required an assessment of which party first invented the commonly claimed subject matter.

The PTAB initially found that there was overlap between the claims as they related to eukaryotic cells. However, in 2017 the PTAB found that there was no interference as Broad's claims were not anticipated by, nor in obvious view of, UC's technology.<sup>8</sup>

It was found that the adaptation of the bacterial CRISPR/Cas9 system to eukaryotes was not the natural next step to a person of

by Hannah Williams, The Legal Forecast



ordinary skill in the technology. Further, it was not expected that UC's technology would be able to function successfully in eukaryotes. UC lodged an appeal of the PTAB decision to the Federal Circuit, which was heard on 30 April 2018.<sup>9</sup> The question was whether the PTAB erred in finding that Broad's advancement was nonobvious. The decision, which may confirm, overturn or remand the case back to the PTAB, is expected later this year.

## Ethical issues

The most ethically contentious element of CRISPR/Cas9 technology is its potential impact on reproductive science. For example, a possible use of CRISPR/Cas9 technology may be to edit embryos that contain the genetic mutation giving rise to cystic fibrosis, thus preventing a child from developing the disease.<sup>10</sup>

This is regarded by many in the industry as a desirable outcome, however it engenders complex legal and bioethical questions regarding eugenics, disability rights and the right to choose the type of child one wants.<sup>11</sup> In addition, genetic modification using CRISPR/Cas9 technology is highly complex, and there are serious concerns that in editing certain DNA sequences there may be unforeseeable alterations to the offspring.<sup>12</sup>

These unintended changes would then be passed down to any children of that individual. So serious are these concerns that a 2015 study by a Chinese group<sup>13</sup> applying CRISPR/Cas9 technology to human embryos prior to IVF implantation was rejected for publication from the largest scientific journals on ethical grounds.<sup>14</sup>

It seems that the greatest ethical dilemma confronting the application of CRISPR/Cas9 technology to the human genome is, at once, the uncertainty surrounding its true capabilities and effects, and the certainty of its tremendous potential.<sup>15</sup> In considering morally acceptable uses of CRISPR, we must also consider the good of future generations.

Hannah Williams is a Queensland executive member of The Legal Forecast. Special thanks to Michael Bidwell and Benjamin Teng of The Legal Forecast for technical advice and editing. The Legal Forecast (thelegalforecast.com) aims to advance legal practice through technology and innovation. TLF is a not-for-profit run by early career professionals passionate about disruptive thinking and access to justice.

## Notes

- <sup>1</sup> H Ledford, CRISPR, the disruptor (2015) *Nature* 522: 20(4); John Mulvihill et al, 'The International Human Genome Organisation Committee of Ethics, Law and Society: Ethical issues of CRISPR technology and gene editing through the lens of solidarity' (2017) *British Medical Bulletin* 122:17-29.
- <sup>2</sup> Jinek et al, 'A programmable Dual RNA-Guided DNA Endonuclease in Adaptive Bacterial Immunity' (2012) 337(6096) *Science* 816- 821.
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- <sup>4</sup> Hyeongsu Rick Park and Brenton Babcock, 'The Legal Battle Around CRISPR Gene-editing Technology and its implications' (2017) 36 *Biotechnology Law Report* 39(2), 40.
- <sup>5</sup> John Cohen, 'How the battle lines over CRISPR were drawn' (15 February 2017) *Science*. Available at: [sciencemag.org/news/2017/02/how-battle-lines-over-crispr-were-drawn](http://sciencemag.org/news/2017/02/how-battle-lines-over-crispr-were-drawn).
- <sup>6</sup> *Ibid*.
- <sup>7</sup> Hyeongsu Rick Park and Brenton Babcock, 'The Legal Battle Around CRISPR Gene-editing Technology and its implications' (2017) 36 *Biotechnology Law Report* 39(2), 41.
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- <sup>12</sup> Adam Cribbs and Sumeth Perera, 'Science and Bioethics of CRISPR-Cas9 Gene Editing: An analysis towards separating facts and fiction' (2017) *Yale Journal of Biology and Medicine* 90: 625-634.
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# EPA can affirm existing binding death benefit nomination!

**A power of attorney can execute a superannuation death benefit nomination on behalf of its principal member!**

*Re Narumon Pty Ltd* [2018] QSC 185 is now authority for that proposition. *But* – and there is always a ‘but’ – the devil is in the detail.

As with many decisions, it is fact specific, nuanced and may be confined to Queensland. A recent and lengthy judgment of 29 pages, it has excited the world of succession and superannuation lawyers, with much having been written about it already.

As such, the focus of this column is to provide a helicopter view for practitioners, while considering some questions that, by the nature of the decision, have now arisen.

The facts involved a lapsing binding death benefit in a self-managed superannuation fund, where the donor of an enduring power of attorney lost capacity during its term. The donor had appointed two enduring powers of attorney – his wife and his sister, who prior to the expiration of the lapsing death benefit nomination, sought to affirm an extension of the existing nomination, whilst executing a new nomination.

The original nomination divided the superannuation 47.5% to the donor’s son, 47.5% to his spouse (attorney), and 5% his sister (attorney). The 5% allocation was an invalid nomination. Prior to the nomination lapsing, the attorneys simultaneously affirmed an extension of the existing nomination, whilst out of an abundance of caution also executed a new nomination, in proportion of 50% to his spouse and 50% to his son.

The court found that the original nomination was valid, except for the portion of the 5% that sought to be provided to a non-dependent, that the extension of the existing nomination was valid,<sup>1</sup> and that the new nomination was an unauthorised conflict transaction,<sup>2</sup> therefore not binding.

“

an attorney could prospectively approach the court for directions, under s118”<sup>1</sup>

Her Honour Justice Bowskill found that, notwithstanding concerns expressed in the Australian Law Reform Commission (ALRC) report into elder abuse,<sup>3</sup> there are no restrictions within the *Superannuation Industry (Supervision) Act 1993* (Cth) (SISA) preventing “an enduring power of attorney, from executing such a nomination on behalf of a member”.<sup>4</sup> However, regard must be had to any restrictions that may exist in the trust deed.<sup>5</sup>

She then analysed the relevant provisions of the *Powers of Attorney Act 1998* (Qld) with particular focus on Section 32, which is the authorising provision permitting attorneys to undertake personal or financial matters on behalf of their principal. By way of guidance, the provision sets out examples of those things that may be done.

Her Honour found that “the examples given are not exhaustive and do not limit the meaning of the provision”.<sup>6</sup> She found that the execution of a binding death benefit nomination was a financial matter,<sup>7</sup> that it was “not a testamentary act”,<sup>8</sup> and not one that was required to be performed personally.<sup>9</sup> Further, absent a transgression of the requirement to avoid conflict transactions,<sup>10</sup> an enduring power of attorney could execute superannuation binding death benefit nomination.

Many commentators view the decision as an important superannuation case. My perspective is that it is an important substituted decision-making judgment. The judgment focuses, at length, on the provisions of the *Powers of Attorney Act 1998* (Qld), the interpretation of several of its provisions and the interaction of its provisions with the documents in question – the nomination and the superannuation trust deed.

Given that the definition of financial matters in the *Powers of Attorney Act* is mirrored verbatim in the *Guardianship and Administration Act 2000* (Schedule 2), there is scope for this decision to also apply to financial administrators appointed by the Queensland Civil and Administrative Tribunal. This would be limited, having regard to the distinction between affirming a nomination and making an entirely new nomination.

Her Honour said [at 89]: “There is a distinction...Where an attorney purports to make a binding death benefit nomination for a principal/member, who has lost capacity, for the first time (that is, where the principal/member had not previously done so personally); or purports to amend or vary a binding death benefit nomination previously made personally by the member, different considerations, in particular in terms of actual or potential conflicts of interest, may arise. In that context, questions as to the scope of the authority of the attorney would arise, in terms of whether the principal had authorised them to enter into a conflict transaction of that type, or generally; and in any event, whether the act was nevertheless one ‘on behalf of’ and in the interests of the principal.” (*footnotes omitted*)

In addressing the concerns expressed in the ALRC report “that BDBNs should be seen to be ‘will-like’ in nature, and, from a policy perspective, treated similarly to wills”,<sup>11</sup> her Honour identified the numerous provisions of the Queensland *Powers of Attorney Act* that have “protective features”.<sup>12</sup>

As practitioners will be aware, all jurisdictions have powers of attorney and guardianship legislation. While they are generally similar, they are not the same. So, for example, there is no equivalent provision to the s73 *Powers of Attorney Act* conflict provision in New South Wales (NSW), South Australia (SA), Western Australia (WA) and Northern Territory (NT), with those jurisdictions relying on the common law.



with Christine Smyth

Similarly, there is no equivalent to our provision s66 – Act honestly and with reasonable diligence in NSW, the Australian Capital Territory (ACT) and the NT.<sup>13</sup> It may be that this distinguishing feature will have a limiting effect, to the extent that practitioners should have regard to the jurisdiction in which a power of attorney is executed in advising clients as to the impact of this decision on their estate plan.

When in doubt as to the attorney's ability to execute a nomination when there were questions as to it being a conflict transaction, her Honour identified that "an attorney could prospectively approach the court for directions, under s118".<sup>14</sup>

With that, the key aspects to be drawn from the decision are:

- **Certain:** A Queensland enduring power of attorney can affirm an existing binding death benefit nomination.

- **Probable:** An enduring power of attorney cannot make a new binding death benefit nomination in favour of themselves; an enduring power of attorney may be able to make a new binding death benefit nomination in favour of other dependents of the principal – but should, in that case, seek court guidance via an application for directions.
- **Limits:** May not apply to EPOAs from other jurisdictions.

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#### Notes

<sup>1</sup> At [93].

<sup>2</sup> At [86].

<sup>3</sup> At [54],[73].

<sup>4</sup> At [60].

<sup>5</sup> Ibid.

<sup>6</sup> At [69].

<sup>7</sup> Ibid.

<sup>8</sup> At [71] citing *McFadden v Public Trustee for Victoria* (1981) 1 NSWLR 15 at 29-32; *Re Application by Police Association of South Australia* [2008] SASC 299; (2008) 102 SASR 215.

<sup>9</sup> Ibid

<sup>10</sup> Discussed at length [76]-[91].

<sup>11</sup> At [73].

<sup>12</sup> At [75].

<sup>13</sup> These provisions were specifically referred to in the judgement. There are a numerous other statutory differences between the Queensland *Powers of Attorney Act* and that of other states and territories.

<sup>14</sup> At [90].

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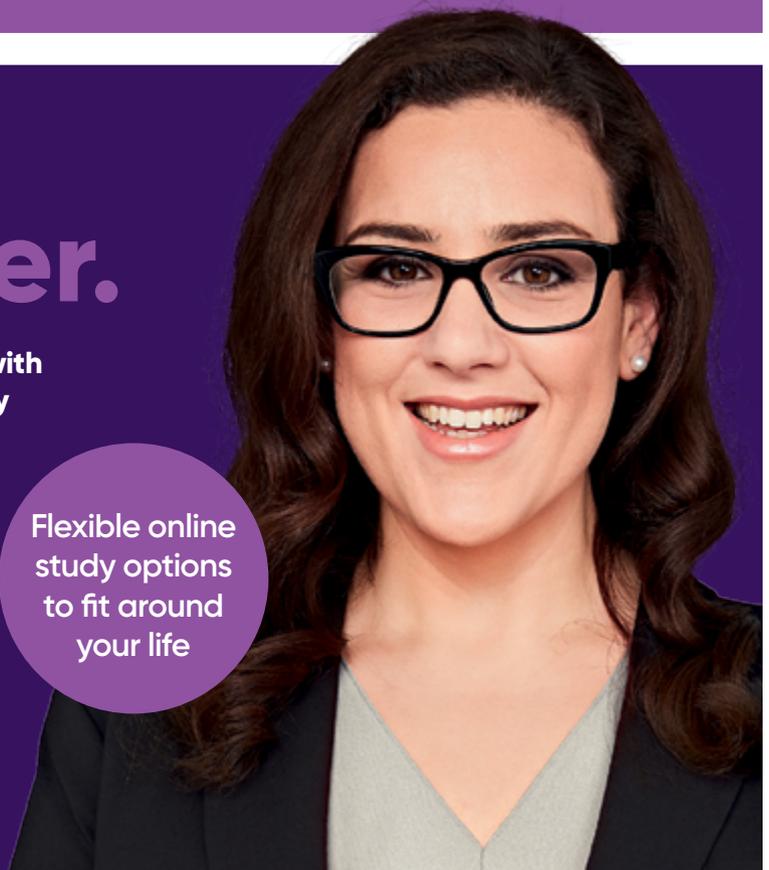
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# High Court and Federal Court casenotes

## High Court

### **Criminal law – trafficking drugs – admissibility of evidence – probative value – tendency**

*R v Falzon* [2018] HCA 29 (orders 19 April 2018; reasons 8 August 2018) concerned the admissibility of evidence on grounds of relevance and tendency. The respondent was charged with cultivating a commercial quantity of narcotics and trafficking. In executing search warrants on several properties, the police found drugs, drug paraphernalia and \$120,800 in cash. The Crown alleged that the trafficking was constituted by the possession of drugs at the properties for the purpose of sale. The respondent argued that the cash should not be admitted as evidence, because it had no probative value or its prejudicial effect outweighed any probative value. The trial judge ruled the cash admissible and it was led as showing that the respondent was running a business in cultivating drugs for sale. The Court of Appeal allowed an appeal, finding that the Crown case was that the drugs were for future business or sales, not that the respondent was running a business. The cash was relevant only to the business aspect. The majority also found that the evidence was inadmissible propensity or tendency evidence. The High Court said that where a person is charged with possession of drugs with intent to sell those drugs, proof that the person was engaged in a business of selling drugs at the time of possession is logically probative of the fact that the accused possessed the drugs to sell them. It is circumstantial evidence that, with the possession and other evidence, could found an inference that the accused had a prior and ongoing drug business, and that the drugs found were for the purpose of sale through that business. The cash was not rendered inadmissible because it tended to show past offences of trafficking. The cash also had high probative value and the trial judge was correct to hold that that value outweighed any prejudicial effect. The court lastly criticised the majority in the Court of Appeal for failing to follow, and wrongly distinguishing, a number of intermediate appellate authorities supporting the trial judge's decision. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly. Appeal from the Court of Appeal (Vic.) allowed.

### **Administrative law – appellate review – migration – unreasonableness – proper standard of review on appeal**

In *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 (8 August 2018) the High Court considered unreasonableness in a tribunal's decision to dismiss a case for non-appearance and considered the role of a court on appeal from the decision of a lower court. The respondent and his wife had applied for protection visas, which were refused by a delegate of the Minister. The respondents sought review before the Refugee Review Tribunal (RRT). The respondents were invited to a hearing before

the RRT, but did not appear. Section 426A(1) of the *Migration Act 1958* (Cth) allowed the RRT to adjourn the hearing or to make a decision on the review without waiting if the applicant failed to attend. The RRT affirmed the decision under review. On judicial review, the Federal Circuit Court held that the RRT's decision to proceed was legally unreasonable because it was not necessarily clear that the respondents were aware of the hearing and there were other steps the RRT could have taken to alert them to the hearing before proceeding. The Full Federal Court upheld this decision. Importantly, the Full Court held that the Minister was required to demonstrate appealable error of fact or law akin to that required in appeals from discretionary judgments (that is, on the principles from *House v The King* (1936) 55 CLR 499). The Full Court held this had not been done. The High Court unanimously allowed the Minister's appeal. An appeal from the Federal Circuit Court to the Federal Court is an appeal by way of rehearing (as opposed to an appeal in the strict sense). In such an appeal concerning whether an administrative decision by the RRT was legally unreasonable, principles from *House v The King* had no application. The Full Court was required to examine the administrative decision of the RRT and to determine for itself whether the primary judge was correct to conclude that the decision was unreasonable. In this case, the Act contemplated that the RRT could take the course that it did. The Act deemed that the respondents had received the invitation to the hearing. The respondents had not attended an earlier interview with the delegate, and there was no explanation for the failure to appear before the RRT. There was nothing to suggest taking further steps would have made any difference. The RRT was entitled to proceed, and there was no indication of unreasonableness from the reasons given by the RRT for proceeding to its decision. Nettle and Gordon JJ; Kiefel CJ, Gageler J and Edelman J each separately concurring. Appeal from the Full Federal Court allowed.

### **Taxation law – franked distributions – franking credits – Supreme Court directions to trustee**

*Federal Commissioner of Taxation v Martin Thomas; Federal Commissioner of Taxation v Martin Andrew Pty Ltd; Federal Commissioner of Taxation v Martin Nominees Pty Ltd; Federal Commissioner of Taxation v Martin Thomas* [2018] HCA 31 (8 August 2018) concerned the extent to which directions given by the Supreme Court of Queensland could determine conclusively the application of Div. 207 of Part 3-6 of the *Income Tax Assessment Act 1997* (Cth). The trustee of the Thomas Investment Trust received franked distributions within the meaning of Div. 207. The trustee passed two resolutions, which sought to distribute, or stream, the franking credits between beneficiaries of the trust separately from, and in different proportions to, the income comprising the franked distributions. The assumption

underpinning the resolutions was that franking credits and income from franked distributions could be distributed in this way – the 'Bifurcation Assumption'. Income tax returns were prepared and lodged on the basis that the Bifurcation Assumption was legally valid. The trustee later sought and received from the Supreme Court of Queensland a direction under *Trusts Act 1973* (Qld) that the resolutions could give, and had given, effect to the Bifurcation Assumption. The commissioner conducted an audit and issued amended notices of assessment. Appeals from those assessments were lodged on the basis that the direction conclusively determined the rights between the parties, even if it was wrong in law. The primary judge dismissed the appeals, holding that the Bifurcation Assumption was flawed in law and that the directions did not conclusively determine the parties' rights. On appeal, the Full Court held that the Bifurcation Assumption was flawed, but held that the directions "conclusively determined the beneficiaries' respective shares of the Trust's net income". The Full Court's conclusion depended on High Court's decision in *Executor Trustee and Agency Co of South Australia Ltd v Deputy Federal Commissioner of Taxes (SA)* (1939) 62 CLR 545 (*Executor Trustee*). Before the High Court, it was conceded that the Bifurcation Assumption was legally ineffective. The High Court unanimously held that the Full Court was wrong to follow *Executor Trustee* and to find that the direction was conclusive. The High Court also rejected alternative arguments raised in notices of contention by the respondents. Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ jointly; Gageler J separately concurring. Two appeals from the Full Federal Court allowed, one in part; two appeals dismissed.

### **Criminal law – resentencing – procedural fairness – departure from facts found**

*DL v The Queen* [2018] HCA 32 (8 August 2018) concerned procedural fairness owed by a court conducting resentencing on appeal. DL was convicted of the murder of TB. TB had suffered 48 stab wounds, including to her head, face, chest and back. She was 15 and DL was 16 at the time of the offence. DL declined to be interviewed by police, but in interviews with psychiatrists, he denied involvement or claimed not to remember. At trial, no defence of mental illness or impairment by abnormality of mind was run. At sentencing, both the prosecution and the defence adduced psychiatric evidence. The primary judge found that it was probable the appellant was acting "under the influence of some psychosis" at the time of the offence. His Honour found that the evidence did not establish premeditation or intention to kill. DL was sentenced to 22 years' imprisonment with a non-parole period of 17 years. On appeal, DL argued and the Crown conceded that the primary judge had erred by giving primary significance to the standard non-parole period in determining the appropriate sentence (so-called *Muldrock*



with Andrew Yuile  
and Dan Star QC

error). That enlivened the Court of Appeal's power to resentence DL. At the hearing of the appeal, neither party challenged the factual findings of the primary judge. However, taking into account evidence of the period since sentencing, a majority of the Court of Appeal rejected the primary judge's findings on mental state and found that there was intention to kill or some degree of premeditation. On that basis, there was no reason to depart from the primary judge's sentence. The High Court noted that the Court of Appeal had power to exercise an independent sentencing discretion, based on material before the sentencing judge, unchallenged factual findings, and evidence of relevant post-sentencing conduct. The High Court held that where the prosecutor makes a concession – here that the primary judge's factual findings were not challenged – and the sentencing judge (or Court of Appeal) is minded not to accept that concession, the failure to put the offender on notice of that and to allow them to respond by evidence or submissions will ordinarily amount to a miscarriage of justice. In this case, it could not be said that the failure to put the offender on notice would not have made any difference. It followed that there had been a miscarriage of justice and the matter had to be remitted for reconsideration by the Court of Appeal. Bell, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from the Court of Criminal Appeal (NSW) allowed.

Andrew Yuile is a Victorian barrister, phone 03 9225 7222, email ayuile@vicbar.com.au . The full version of these judgments can be found at [austlii.edu.au](http://austlii.edu.au) .

## Federal Court

### Practice and procedure – mandatory interlocutory injunction granted

In *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2018] FCA 1221 (13 August 2018) Beach J granted a mandatory interlocutory injunction sought by the Australian Competition and Consumer Commission (ACCC) that required certain companies (the Aurizon parties) to carry on Queensland's intermodal business (QIB). (Note: 'Intermodal' refers to the carriage of general freight usually in a container using two or more modes of transportation, such as truck and rail.)

The injunction application was in the context of proceedings instituted by the ACCC for alleged contraventions of ss45 and 50 of the *Competition and Consumer Act 2010* (Cth) (CCA) (at [18]-[20]). The impugned conduct arose from the sale and purchase of the Aurizon parties' QIB.

The ACCC sought interlocutory injunctive relief against the Aurizon parties requiring them to carry on Aurizon's QIB until the hearing and determination of the proceedings. Beach J summarised why he granted a mandatory injunction at [2]: "The mandatory injunction sought against the Aurizon parties is exceptional.

Nevertheless, given that I have determined to bring on the main trial of these proceedings on 19 November 2018, and to deliver a final judgment before Christmas of this year, I propose to grant the injunction sought. The injunction will operate for a relatively short period, even though I accept that there will be significant prejudice to the Aurizon parties in the interim. The injunction is necessary to preserve the status quo. In this regard the Aurizon parties have not yet commenced to shut down the QIB. Moreover, the injunction is necessary to preserve the competitive framework in Queensland concerning the relevant markets dealing with intermodal and steel rail linehaul services. If no injunction is granted, Pacific National may achieve a monopoly position in Queensland which to say the least is likely to produce a substantial lessening of competition. Now I accept that I ought only grant a mandatory injunction of the type sought in exceptional circumstances. Moreover, the present context also involves no undertaking as to damages being given by the ACCC, which is a point in favour of the Aurizon parties on the balance of convenience. But the period of the restraint is short. The status quo is preserved by the restraint. And the adverse consequences for competition are too severe if I do not impose the restraint..."

The court discussed the test for an interlocutory injunction as it applies in relation a mandatory injunction (at [5]-[15]). There is no separate test for a mandatory interlocutory injunction compared to that for a prohibitive injunction (at [8]).

### Practice and procedure – res judicata – whether final judgment must be decided 'on the merits'

*Zetta Jet Pte Ltd v The Ship 'Dragon Pearl'* (No.2) [2018] FCAFC 132 (16 August 2018) concerned a claim from Zetta Jet Pte Ltd and Mr King (a trustee appointed to Zetta Jet under the insolvency law of the United States) that Zetta Jet was the owner in equity of a vessel, *Dragon Pearl*, which was in the custody of the Admiralty Marshal pending the outcome of the proceedings. When the matter was to be heard, Zetta Jet failed in a late application to adjourn the proceedings. Counsel for Zetta Jet was then invited to open and lead evidence and, after he indicated that he was not in a position to do so, the proceedings were dismissed. An appeal against the decision to dismiss the proceedings was unsuccessful.

Half an hour after the appeal was dismissed, the vessel was sold by the registered owner. After second proceedings were dismissed, Zetta Jet and Mr King then commenced third proceedings including an application for an interlocutory injunction to restrain the new owner from removing the vessel from Australian waters. Claims to proprietary relief of the same kind as those that had been advanced against the previous owner of the vessel in the first proceedings were advanced in support of the application for an injunction. There was also a new proprietary claim based upon an alleged alienation to defraud creditors of Zetta Jet and, in addition, a proposed claim

for relief for an uncommercial transaction under s588FF of the *Corporations Act 2001* (Cth).

The primary judge refused the interlocutory injunction on the basis that a res judicata arose in respect of claims in rem by Zetta Jet or Mr King against the vessel by reason of the dismissal of the original proceedings. Zetta Jet and Mr King sought leave to appeal from that refusal and the orders for the summary dismissal of a second in rem claim against the vessel.

The Full Court held that the primary judge was correct in refusing the claim to injunctive relief based upon principles of res judicata insofar as those claims depended upon a *Barnes v Addy* claim to ownership in equity by Zetta Jet of the vessel or the other proprietary claim based on an alleged alienation to defraud creditors. However, leave to appeal was granted and orders made to allow Mr King to pursue his application for urgent provisional relief based upon the claim to orders under s588FF of the *Corporations Act* which were not considered by the primary judge (at [11]-[13]). Whether *Anshun* estoppel or abuse of process apply in respect of this claim was remitted to the primary judge (at [59]).

The Full Court analysed the state of the law on res judicata (at [14]-[51]). The key question in this case was whether there needed to be a final judgment 'on the merits' of a claim in order for res judicata to apply. Based on an examination of Australian authority, the Full Court held there is no such requirement. English cases which suggest otherwise are founded on a different use of terminology (that is, an English practice of using the term res judicata to apply to both a cause of action estoppel and an issue estoppel) (at [36] & [45]).

Allsop CJ and Moshinsky and Colvin JJ explained at [33]: "It is an important principle. A party who is commanded to attend a trial or final hearing to answer a claim based upon a cause of action would face the same injustice if the claim could be reagitated after final judgment was given dismissing the claim irrespective of the circumstances in which the judgment was given. Whether a claim is allowed or dismissed by consent, default or after a contested hearing, the need for finality is the same in each instance. A party who wishes to preserve the right to bring further proceedings should seek leave to discontinue. The need for finality is one reason why an application for such leave may be refused if brought late in the day and without explanation beyond inability to proceed with the case."

As the judgment in the original proceedings brought by Zetta Jet and Mr King was final in respect of all causes of action then raised, the principles of res judicata applied (at [52]-[54]).

Dan Star QC is a senior counsel at the Victorian Bar and invites comments or enquiries on 03 9225 8757 or email [danstar@vicbar.com.au](mailto:danstar@vicbar.com.au) . The full version of these judgments can be found at [austlii.edu.au](http://austlii.edu.au) .

# Court finds error in global approach

with Robert  
Glade-Wright



**Property** – in isolating a contribution to a specific asset in a global approach, court failed to heed risk of ignoring contributions that lacked such a nexus

In *Hurst* [2018] FamCAFC 146 (8 August 2018) the Full Court (Thackray, Ainslie-Wallace & Murphy JJ) heard the wife's appeal against a property order relating to a 38-year marriage in which the husband inherited land 14 years before trial (the Suburb C property). The land was worth \$400,000 when acquired but \$1.82m at trial. The parties had three children. The youngest child (13) and the eldest, an adult child with psychiatric issues, lived with the wife.

The net pool was worth \$2.66m. Carew J assessed contributions at 72.5:27.5 in the husband's favour, saying (at [14]) that "[i]t cannot be said that the wife has made any contribution to...[the inherited land] other than indirectly by the rates and slashing costs being paid". A 12.5% adjustment under s75(2) for the wife produced an overall 60:40 division for the husband. The Full Court said (from [15]):

"...Within the context of [a global] approach a broad assessment is made of the contributions of all types made by both parties across the whole of the period of a very long marriage. Yet, the reasons also evidence one exception to that approach, namely the identified indirect (financial) contributions made to the Suburb C property.

[16] There is no error of itself in her Honour considering separately any such contributions...

[17] However, there is a danger in doing so. Isolating indirect contributions to but one part of the property interests of the parties in the context of a global assessment of contributions risks ignoring significant contributions made by both parties that do not have a nexus with that particular property. We consider...that her Honour did not heed that risk. The finding that the wife has not made any contributions to the Suburb C property other than the specific indirect contribution to slashing and rates is, in our...view, not open to her Honour on the evidence before her."

Also (at [57]-[65]) discerning error in the trial judge's assessment of s75(2) factors, the court allowed the appeal, remitting the case for rehearing.

**Children** – judge avoided determining the issues presented by the parties at an interim hearing

In *Matenson* [2018] FamCAFC 133 (20 July 2018) Murphy J, sitting in the appellate jurisdiction of the Family Court of Australia, allowed the appeal of an unrepresented father against the dismissal of his interim parenting application by an unidentified judge of the Federal Circuit Court relating to children aged 16, 13 and 11. His concern was the lapse of time since he had seen his children despite an earlier order granting time which he alleged the unrepresented mother was contravening.

Despite all parties seeking an order for *some* time (the father, the removal of supervision, and the mother and independent children's lawyer, an order that the eldest child see the father as she wished but that the other children spend some time with him) the court, referring to "an impasse" ([26]), dismissed all interim applications and set the case down for trial in 10 months. In allowing the appeal and remitting the case for rehearing, Murphy J said (from [33]):

"In the Federal Circuit Court at least, interim proceedings are almost always conducted within huge lists where large numbers of cases seek a hearing. The convoluted and conflicting assertions common to many of those cases cannot be tested. The exquisite difficulties in fashioning interim orders in the best interests of the subject child or children pending a trial (which those same scarce resources dictate may be significantly delayed) is, or should be, obvious.

[34] Yet, it is a task which, with all its inherent difficulties, must be confronted not avoided. The jurisdiction of the court has been properly invoked and it must be exercised, albeit it is significantly less than ideal circumstances. (...)

[36] At no time did her Honour identify the competing proposals of the parties or identify the issues necessary for her determination. Her Honour makes no reference to matters which she considered uncontentious. Indeed, the references to any evidence are...extremely sparse. ...[T]he family report...was alluded to but her Honour did not refer to any particular aspects of that (albeit untested) evidence."

**Children** – Section 65DAA not triggered by order for equal shared parental responsibility as to some but not all major long-term issues

In *Pruchnik & Pruchnik (No.2)* [2018] FamCAFC 128 (11 July 2018) the Full Court (Ryan, Aldridge & Austin JJ) dismissed with costs the mother's appeal against Hannam J's parenting order implementing a change of care for children of 12 and 9 to the father from the mother, who was found to have been intermittently withholding the children since 2014 (three years after separation) "without reason" ([2]). It was also found that the children were at risk of rejecting the father unless the family dynamics in the mother's household towards the father changed ([3]). The mother was granted supervised time.

Sole parental responsibility had been sought by both parties (the father as to medical and schooling decisions only) but was granted to the father. On appeal the mother argued that as the presumption of equal shared parental responsibility had not been rebutted under s61DA(4) the court failed to apply s65DAA (court to consider equal time etc. if an order is made for such responsibility).

The Full Court (at [35]-[37]) applied authority including *Doherty* [2016] FamCAFC 182 which held that an order for equal shared parental responsibility need not be in relation to every aspect of parental responsibility and that such an order does not trigger s65DAA. The court (at [49]-[50]) rejected submissions by the mother and independent children's lawyer that explicit and cogent reasons (and thus evidence) why the presumption should be rebutted were necessary, given that the parents had agreed that the conditions for the operation of s61DA(4) were met. The court added:

"It follows that against the background of the mother's concession as to the application of s61DA(4) (a concession which, given the orders sought by the father, he also adopted), it was sufficient compliance with the provision for the primary judge to declare herself...satisfied that 'in these circumstances it is in the children's best interests for the parent with whom the children are to primarily live to have sole parental responsibility for them'..."

Robert Glade-Wright is the founder and senior editor of *The Family Law Book*, a one-volume loose-leaf and online family law service (thefamilylawbook.com.au). He is assisted by Queensland lawyer Craig Nicol, who is a QLS accredited specialist (family law).

# From the ashes: the Supreme Court fire of 1968

with Supreme Court  
Librarian David Bratchford



On 1 September 1968 the historic Queensland Supreme Court building was set alight by arsonist David Brooks, leaving much of the building in ruins and seriously damaging library books and portraits hanging in the Judges' Hall.

Our unique legal heritage collection contains many items from this period, and they are now on display in the library to mark the 50th anniversary of the Supreme Court fire.

## *From the ashes: the Supreme Court fire of 1968*

10 September to 21 December

Free entry, weekdays from  
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Supreme Court Library Queensland  
Level 12, QEII Courts of Law

This curated historical showcase includes:

- a clock made by renowned Brisbane clockmakers Herga & Co, which was salvaged from the ruins of the fire, and recently donated to our collection
- photographs documenting the aftermath of the fire, donated to the collection by His Excellency the Hon. Paul de Jersey AC
- original depositions from *The Queen v David Bertram Brooks 1969*
- salvaged fire-damaged law reports.

## From the ashes: a brief history

In the early hours of a cold Brisbane morning in 1968, David Bertram Brooks – a man “sour on the world”<sup>1</sup> – entered the unlocked front door of Queensland’s historic Supreme Court.

Resentful of the police and the justice system for his frequent arrests, Brooks made his way to the judges’ chambers and set the building alight. On his way out, he drove a knife into an associate’s desk and scribbled the note, “judge not lest you be judged sinner”.



*The Supreme Court building after the 1968 fire.* Courtesy of and copyright the Hon. Kenneth Mackenzie. Donated to the Supreme Court Library Queensland heritage collection by his Excellency the Hon. Paul de Jersey AC.

By the time the fire was brought under control, much of the building was in ruins. Many of the Supreme Court Library’s books were seriously damaged by fire, smoke and water.

In the days following the fire, judges, their associates, members of the legal profession, and law students from the University of Queensland diligently searched through the charred rooms to salvage books, court records, artworks and personal effects. Only the registry could operate from the burnt building, which it did through a side window. The few judges’ chambers still safe were used to hear civil matters, and other Commonwealth courts in the city were co-opted for use.

Brooks was apprehended within three days of the fire, and convicted within three months of the crime. The building’s fate took longer to resolve. It was not until 1978 that the old courts were finally demolished, and a new Supreme Court was opened in 1981.

## A personal recollection

The Hon. Richard Chesterman AO RFD QC was a final-year law student and associate to Justice (later Chief Justice) Wanstall

when news of the fire broke. His personal recollections of the fire are recorded in a 2016 Selden Society lecture. Watch a video recording of the lecture or download the paper at [sclqld.org.au/selden](http://sclqld.org.au/selden).

The Supreme Court Library Queensland maintains a unique collection of legal heritage items, which have been generously donated by members of the judiciary, the legal profession and the wider community. Our collection includes rare books, photographs and images, biographical files, oral histories, textiles and artworks.

We welcome donations of legal and historical interest that help us preserve and share Queensland’s legal heritage. If you would like to donate, please email us at [hqp@sclqld.org.au](mailto:hqp@sclqld.org.au) or phone 07 3247 5434.

## Notes

- <sup>1</sup> Brooks in a statement to police, 1968.

# Court of Appeal judgments

1 to 31 August 2018



with Bruce Godfrey

## Civil appeals

*Inghams Enterprises Pty Ltd v Kim Yen Tat* [2018] QCA 182, 3 August 2018

Application for Leave s118 *District Court Act* (Civil) – where the respondent brought an action in negligence – where the respondent was employed by the applicant – where the respondent was attacked by a third party in the applicant's car park – where as a result of the encounter the respondent suffered a significant post-traumatic stress disorder injury, which she attributed to the negligence of the applicant – whether the primary judge erred in finding the risk was reasonably foreseeable – whether the primary judge erred in finding the applicant breached its duty of care – whether the primary judge erred in finding the breach caused the injury – where the evaluation which the primary judge reached was justified on the evidence before him and for the reasons which he gave – where the judgment which his Honour formed about the risk to female workers in the circumstances revealed by the evidence before him was unremarkable – whether the primary judge erred in inferring that a different course of events would have occurred – where the findings made by the primary judge reflected his acceptance of aspects of the expert opinion evidence which had been adduced by the respondent from engineers experienced in risk management and security assessments – where the conclusion which his Honour reached, that the security measures in place were not aimed at protecting employees from third-party violence and that the security officers should actually be performing their duties with that risk in mind, was also supported by the evidence to which his Honour referred and cannot be criticised – where although his Honour did make reference to the notice which the applicant gave to its workers after the incident had occurred, that reference was as an exemplar of the sort of proactive response which he thought should have been adopted before the incident and, consequent upon an appropriate examination of risk, as a response to risk – where, given that he did not treat the post-incident conduct as an admission, it was unnecessary for him specifically to advert to the applicant's submission that he should not do so – where the primary judge found the appellant breached its duty of care by failing to educate its employees to report suspicious behaviour – where the primary judge found the injury would not have occurred 'but for' the breach – whether the primary judge erred in inferring that a different course of events would have occurred – whether the primary judge failed to provide adequate reasons – where his Honour's hypothesis was that with training and instruction, the injury to the respondent would not have happened – where the applicant was justifiably critical of the paucity of his Honour's reasons on this critical issue – where there was no engagement with the statutory provisions, which

require an approach to causation different to that which is the subject of the common law: see *Strong v Woolworths Ltd* (2012) 246 CLR 182, nor was there any engagement with the evidence of the individuals who had been approached – where finally, there was no engagement with the applicant's argument at trial that, on the evidence, the proper conclusion was that the respondent had not proved the injury to her would have been avoided had the alleged negligence not occurred – where although his Honour plainly rejected that argument, he did not explain why – where the failure to provide adequate reasons is an error of law: see *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 – where the question here is whether it was correct for the primary judge to infer the existence of a particular state of affairs, namely that particular omissions may be regarded as a necessary condition of the occurrence of injury and, therefore, as satisfying the requisite standard of factual causation, because if the omissions had not occurred, it is more probable than not that the injury would have been avoided because a different course of events would have occurred – where the question is whether at least one of the workers involved in the three encounters which took place between 11 pm and 11.45 pm would have would have been sufficiently concerned about Brain (the assailant) that they would have called security and reported the facts justifying that concern – where the evidence of the female workers Brain approached was that Brain's conduct caused each of them to experience a degree of apprehension – where however, the degree to which that occurred varied and the level of apprehension which they say they experienced must be thought to have been expressed by them through the prism of hindsight and with the knowledge that Brain had actually posed a danger to them – where the result is that it was not open for the primary judge to make the finding which he did concerning the likelihood of a report actually being made – where if a security guard had received a report from one or other of the female workers approached by Brain which said his behaviour was suspicious and reported the facts said to justify that concern, the question is whether the guard would have left the security office and would have found Brain and required him to move on – where the most which could be legitimately inferred is that, if a report had been made, the guard would have been left with a heightened state of awareness as to the possibility that a male person in the car park might pose a threat to female workers – where the question is whether, if a security guard had required Brain to leave the car park, Brain would have complied, and, critically, would not have come back in time to encounter and injure the respondent – where it must be recalled that there were people wandering out into the car park all the time and there were always workers who liked to hang around in the car park after work to have a gossip, smoke or wait for their friends – where Brain was determined

to do what he had apparently set out to do, and was not necessarily responding rationally to what should, rationally, have been treated as a sufficient deterrent on the night in question – where the applicant has demonstrated that the primary judge erred in relation to the question whether the applicant's breach of duty caused the respondent's injury – where the error was fatal to the respondent's claim against the applicant.

Applicant is granted leave to appeal. The appeal is allowed. The judgment of the primary judge is set aside and in lieu thereof it is ordered that judgment is entered for the applicant on the respondent's claim. Costs.

*Intensia Pty Ltd v Nichols Constructions Pty Ltd* [2018] QCA 191, 17 August 2018

General Civil Appeal – where the parties contracted for the sale of land – where it was held at first instance that the appellant's termination of the contract was not justified – where the appellant argued on appeal that its termination was justified as the respondent had breached cl.7.4(3)(a)(ii) of the standard REIQ contract in its warranty that it was not aware of any facts or circumstances that may lead to the land being classified as contaminated land under the *Environmental Protection Act 1994* (Qld) (EPA) at the time of contract – where the respondent had demolished dwellings on the land before entry into the contract – where, after the date of contract, the demolition of the buildings caused the contamination of the land with asbestos – whether the phrasing 'may lead to' should be construed broadly to incorporate mere possibility – whether the respondent had breached cl.7.4(3)(a)(ii) such as to give the appellant a right to terminate – where the EPA provides how the administering authority can or must be notified that land is contaminated land – where it knew from the approval of its application for demolition of the buildings that the buildings may contain asbestos – where the seller engaged a builder to conduct the demolition – where the fact that contamination did occur in this case cannot be used as *ex post facto* justification for holding that the seller must have been aware that that might happen and so have been obliged to disclose it in the contract or be in breach of the seller's warranty found in cl.7.4(3)(a)(ii) entitling the buyer to terminate the contract – where there was no basis for the seller to form the view, at the relevant time, that the land might become contaminated by a hazardous contaminant which would oblige it to report that contamination to the administering authority within 22 business days – where there was no evidence capable of suggesting that the seller was aware of any facts or circumstances at the time it entered into the contract which could lead to the land being listed as contaminated land as a result of the statutory process set out in s373 and s374 of the EPA.

Appeal dismissed. Procedural orders on costs.

**Commissioner for Liquor and Gaming v Farquhar Corporation Pty Ltd [2018] QCA 202, 31 August 2018**

General Civil Appeal – where the appellant was refused an application under s111 *Liquor Act 1992* (Qld) (LA) to alter ID scanning commencement time for the Caxton Hotel on three dates when events were to be held at nearby Suncorp Stadium – where QCAT set aside the appellant’s decision and altered the ID scanning commencement time – where the appellant submits QCAT erred in finding that s142ZZB LA conflicts with Part 6AA LA – whether QCAT did so find – where the appellant submits QCAT erred in failing to expressly refer to s121 LA which sets out mandatory considerations – whether express reference to s121 LA was required – where the appellant submits QCAT erred in applying a ‘balancing exercise’ drawn from applications for exemptions of areas from ID scanning to an application for alteration of times for ID scanning – whether such applications are distinct – where the appellant submits QCAT erred in failing to give priority or primacy to s3(a) LA among the purposes of the Act – whether QCAT misdirected in law as to the weight to be given to s3(a) LA – where the appellant submits QCAT erred in failing to expressly consider appellant’s statement of reasons – where it should be noted also that QCAT was required to make its decision urgently on 10 July 2018 because the State of Origin match was to be held the next night – where the reasons were accordingly given *ex tempore* – where as well, it should be noted that such reasons are not to be assessed by the standards that apply to the reasons of a court, but by those that apply to the tribunal – where the appeal to this court is one that a party to the proceeding for the decision of QCAT may bring, “but only if the appeal is on a question of law”: see s35(3) of the LA – where photographic and other evidence before QCAT showed that on a major event day, such as a State of Origin rugby league match, Caxton Street is closed to vehicle traffic from Petrie Terrace in the direction of the Suncorp Stadium to a point past the Caxton Hotel – where after the event, spectators leaving Suncorp Stadium stream

up Caxton Street towards Petrie Terrace across both the footpath and the road surface of Caxton Street – where at the same time, patrons seeking to enter the Caxton Hotel line up from the entrance (at which ID scanning would be performed), across the footpath and the road surface – where the outcome is a conflict in pedestrian traffic movements between the stationary line of patrons waiting to enter the Caxton Hotel and the spectators leaving Suncorp Stadium and walking up Caxton Street toward Petrie Terrace – where QCAT noted that the ID scanning obligations created under Part 6AA LA might operate in a way that conflicts with the obligation to provide and maintain a safe environment in and around the premises, under s142ZZB LA – where QCAT did not hold that the ID scanning obligations must give way to the obligation to provide and maintain a safe environment under s142ZZB LA – where it is unnecessary, therefore, to decide whether, properly construed, s142ZZB LA would operate in priority to the ID scanning operations in the event of a potential contravention of s142ZZB LA – where there is no distinction between the approach to a discretionary decision to be made under s111 of the LA in relation to the application of conditions for ID scanning as between an application for exemption of an area, on the one hand, and an application to alter the regulated ID scanning times, on the other hand, as a question or matter of law – where no question of law is raised based on the distinction between those two kinds of applications – where the appellant relied on QCAT’s reference in the *ex tempore* reasons to the rivalries between states that can be quite intense amongst spectators at a State of Origin match as possibly causing heightened tensions – whether or not there was specific evidence supporting that fact, to make such a finding was not an error of law for the purposes of grounding an appeal on an error of law – where the appellant submitted that the finding that there was potential for aggression and violence between people in the queue entering the Caxton Hotel and spectators streaming up Caxton Street was hypothetical – where the challenge sought to be raised is to QCAT’s finding of fact that

there was a potential for aggression and violence and is not a question of law that will ground an appeal on an error of law.

Appeal dismissed. Costs.

## Criminal appeals

**R v RAZ; Ex parte Attorney-General (Qld) [2018] QCA 178, 3 August 2018**

Sentence Appeal by Attorney-General (Qld) – where the respondent was convicted of 18 sexual offences committed against his step-grandson over the course of a period of 12 years – where the Crown submitted for a head sentence of between 10 and 12 years’ imprisonment at first instance – where defence counsel at first instance submitted that a head sentence of eight years’ imprisonment was appropriate – where all sentences were ordered to be served concurrently and the respondent was sentenced to a head sentence of nine years on the first count, that of maintaining a sexual relationship with a child under 16 – where the appellant complained of four errors on the part of the sentencing judge – where the period of offending was a very important factor to be considered – where the respondent’s position as a magistrate was a relevant factor as it put him in a special position to fully appreciate the deleterious effects of sexual offences upon children – where the combination of the complainant’s age, the length of the offending and knowledge of the effects of the offending on the complainant made this an exceptional case – where the respondent has shown no remorse whatsoever for his crimes – where he pleaded not guilty and instructed his counsel to put to the complainant in cross-examination that he had made up a story to get money – where after the jury convicted him, the respondent refused to accept their verdict and proclaimed himself to be innocent of all charges – where this was a remarkable case in which the respondent began his sexual victimisation of the complainant when he was only four or five years old – where he used his position of trust and the opportunity it gave

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him as the child's putative grandfather to enable him to satisfy his perversions – where he persisted with his predation until after his victim turned 16 – where in this way he devoured the complainant's whole childhood and thereby ultimately corroded his whole life – where the period of the offending and when it occurred in the child's life, therefore, was a very important factor to be considered – where so too was the respondent's position as a magistrate – where as a magistrate hearing cases of sexual offences the respondent was in a special position to gather knowledge from the mouths of victims about the effect of sexual offences upon children – where the respondent's position as a magistrate meant that, while he was committing these crimes, he knew very well what his criminal acts were doing to his victim and would continue to do – where a sentence that properly reflects the respondent's offending, the circumstances of that offending and of his character and which properly reflects the community's expectation that the court denounce such crimes, calls for a sentence in respect of the maintaining offence of 11 years' imprisonment.

Appeal allowed. Sentence of nine years' imprisonment on count 1 of the indictment be set aside. Respondent be sentenced to 11 years' imprisonment on count 1 of the indictment. The conviction on count 1 of the indictment be declared a serious violent offence.

#### *R v LAL* [2018] QCA 179, 3 August 2018

Sentence Application – where the applicant was convicted, after a trial, of two offences of indecent treatment of a child under 12 – where the offences were committed when the applicant was a child but he was convicted as an adult – where the applicant was sentenced to imprisonment for four months for count 1 and nine months for count 2, to be served concurrently, wholly suspended, for an operational period of nine months – where those sentences carried convictions – where counsel for the applicant submitted that the applicant should have been sentenced to a period of probation to allow for an order that no convictions be recorded – where apart from informing his Honour of the incorrect maximum penalty which would have applied had the applicant been sentenced as a child (it was seven years' detention, not five), the prosecutor said nothing more about the sentence that might have been imposed upon the applicant had the applicant been sentenced as a child – where neither he, nor defence counsel, referred to examples of children sentenced, as children, for like offending – where neither he, nor defence counsel, referred to the relevant principles, contained in ss4 and 109 of the *Juvenile Justice Act 1992* (Qld) (JJA), which would have applied had the applicant been sentenced as a child – including that detention was a last resort – where his Honour should have been referred to *R v PGW* (2002) 134 A Crim R 593 for the guidance it provides to sentencing courts dealing with an offender in accordance with s144 of the *Youth Justice Act 1992* (Qld) (YJA) – where it has been considered or applied many times at first instance in comparable cases, resulting often in orders under s19(1)(b) of the *Penalties and Sentences Act 1992* (Qld), including in cases involving more serious offending than the applicant's – where in the absence of assistance from counsel, and

not having been referred to relevant authority, his Honour erred in his approach to s144 of the YJA, and in particular the application of s144(2)(b) YJA – while his Honour had regard to the sentence that might have been imposed upon the applicant had he been sentenced as a child (namely, probation), and discounted its present utility for the rehabilitated applicant, his Honour did not consider whether there was a reason to sentence the applicant more harshly as an adult – where also, in the absence of assistance, his Honour erred in concluding that the applicant would have “exposed himself [as a child] to the potential of a detention order for offending of this nature, particularly after pleas of not guilty” – where that is not borne out upon a consideration of comparable cases, nor upon the application of the relevant principles which would have applied to the applicant's sentence as a child – where the applicant has matured into a law-abiding, productive member of the community – where not only is there a real risk that the findings of guilt per se will hinder the applicant in his contemplated future employment as a nurse but there is also a real risk of additional social prejudice attaching to the *recording* of convictions, including by his becoming a ‘reportable offender’ – where sentencing the applicant is difficult – where he is an adult to be dealt with for sexual offences committed upon a child, but he was himself a child, albeit an adolescent, and a victim of child sexual abuse, when the offences were committed 17 years ago – where had the applicant been sentenced as a child, he would have been sentenced to a period of probation with no conviction recorded, to encourage his rehabilitation – where taking into account all relevant matters, a harsher sentence than that which might have been imposed upon the applicant had he been sentenced as a child is not warranted – where nothing calls for his rehabilitation or support (*cf* probation) – where nothing suggests that he must account for himself into the future (*cf* a bond, or as a ‘reportable offender’) – where nothing suggests that a recorded conviction should follow him – it is unlikely that he will sexually re-offend against children, and he is, regardless, a disqualified person – where notwithstanding the finding that a harsher penalty is not warranted, the delay in the applicant's prosecution for this offending means that his social and occupational standing has in fact been affected to a greater extent than it would have been had he been sentenced as a child – where having regard to all proper matters, including the applicant's age when the offences were committed, his rehabilitation and demonstrated good character thereafter, and the social and occupational consequences of the findings of guilt *per se*, only nominal punishment, in addition to those consequences, should be imposed upon the applicant – where that is not to suggest that the complainant has not been criminally wronged – where she has been, and she has suffered because of it – where having pleaded not guilty, notwithstanding his apologies during the pretext call, the applicant cannot claim to have demonstrated remorse by sparing the complainant the necessity of having to give evidence.

Application for leave to appeal granted. Appeal allowed. Sentences imposed at first instance are set aside. In lieu thereof, the applicant is to be

released upon his entering into a recognisance, in the sum of \$500, on the condition that he be of good behaviour and appear for conviction and sentence if called upon at any time during the next two months. No convictions are recorded.

#### *R v Trebeck* [2018] QCA 183, 7 August 2018

Appeal against Conviction – where the appellant was convicted of murder after a 13-day trial – where the case against the appellant was circumstantial, with no evidence of motive, and relied upon post-offence conduct of the appellant – where manslaughter was properly left for the jury as an alternative verdict despite not being a feature of the defence case – where the Crown retained the onus of proving intention and the jury retained the obligation to exclude any inference consistent only with manslaughter – where it was submitted by counsel for the appellant that the directions given by the primary judge allowed the jury to rely on the post-offence conduct as evidence of consciousness of guilt of murder, without considering whether that conduct could only point to consciousness of guilty of manslaughter – where the Crown submitted that the *Edwards v The Queen* (1993) 178 CLR 193 direction given by the primary judge had been effective, in the context of the summing up as a whole, and that *R v Mitchell* [2008] 2 Qd R 142 could be distinguished – where the directions in this case suffered in the same way as those in *R v Murray* [2016] QCA 342 and *Mitchell* – where first, it is doubtful that the jury would have understood that they may use the evidence of the lies as an indication of a consciousness of guilt of murder, only if they were satisfied that the lie was not told out of a consciousness of guilt of the manslaughter – where unless the jury rejected the factual possibility that the lies were only referable to the manslaughter, they should not have taken them into account only in respect of the question of intent on the murder – where, secondly, there was no direction to the jury requiring them to consider whether the conduct was consistent only with a consciousness of guilt of manslaughter – where thus, the jury may well have understood that they could consider the lies only in respect of the murder charge, without first considering whether they applied to the manslaughter – where, as was said in *Mitchell*, where the accused is charged with murder, but the lesser offence of manslaughter is available, “it is of critical importance to identify what is in issue at the trial and what precise admission is established by the lie” – where in considering that question the admission that the killing was unlawful assumed some significance – where it meant that in respect of the manslaughter alternative the fact that the deceased had been killed unlawfully was admitted – where it followed that if the jury reached the conclusion that it was the appellant who killed the deceased, a verdict of manslaughter would necessarily follow – where therefore in respect of that charge the admission to be established by the lies in the post-event conduct was simply that it was the appellant who killed the deceased – where on the murder charge, the position was different – where one thing was common, namely that one admission sought to be established by the post-event conduct was that the appellant was the killer – where, however, as the jury was told on several occasions, the second admission that the post-event conduct was relied upon to

establish was that at the time of the killing the appellant held the intent to kill or to do grievous bodily harm – where even though that is so, that does not avoid the difficulty that the jury was not directed to consider whether the post-event conduct, and more specifically the lies, were referable only to a consciousness of guilt of manslaughter, rather than a consciousness of guilt of murder – where as a consequence, the jury was not directed as to how to approach those questions, nor given any assistance as to whether the identified lies and other post-event conduct bespoke a consciousness of guilt of the one offence (manslaughter) as opposed to the other (murder) – where, as was said by Keane JA in *Mitchell* it was necessary to ensure that the jury clearly understood that they might use the evidence of the lies as an indication of consciousness of guilt of murder only if they were satisfied that the lies were not told out of a consciousness of guilt of manslaughter – where having been given no guidance in that respect there is an obvious risk that the jury did not reason properly in dealing with that category of the evidence – where reference to the identified lies leaves open the suggestion that some or all of them could be said to be referable only to a consciousness of guilt of manslaughter, rather than indicative of an intent in relation to murder.

Conviction be set aside and a retrial ordered.

*R v Brock* [2018] QCA 185, 7 August 2018

Appeal against Conviction & Sentence – where the appellant/applicant was convicted after a trial of three counts of indecent treatment of a child

under the age of 14 years – where the alleged incidents occurred between 1982 and 1985 in the context of a ‘Big Brother’ program run by the Catholic Church – where it was submitted on behalf of the appellant/applicant that both the complainant and his mother were unreliable witnesses – where the preliminary complaint evidence was ambiguous due to conflicting accounts – where the passage of time was significant – where the complainant had suffered from alcohol and medical issues, including periods of blacking out – where the Crown submitted that any inadequacies or discrepancies did not taint the probative force of the evidence – whether the verdict was unreasonable or insupportable having regard to the evidence – where the fact that the evidence concerning the incidents and subsequent events, including dates in relation to the program, displayed some inconsistencies or lack of particularity, does not compel the view that the evidence should have been rejected by the jury – where the passage of time explains them, and the *Longman* direction (*Longman v The Queen* (1989) 168 CLR 79) dealt with it – where evidence was given that after the complainant had told his mother of the alleged incidents, she wrote a letter of complaint to the organisation – where that letter was not sent to the appellant, nor was there any suggestion that the mother had communicated the contents of it to the appellant – where three or four weeks after that letter was sent, the mother gave evidence that the appellant/applicant arrived at her front door and said, “I thought you would have wanted me

to do that” – where the mother assumed he was talking about the sexual assaults – where during the trial the statement was continually referred to as an “admission” and a “confession” – where on appeal, the question arose as to whether what was said by the appellant could have amounted to an admission of guilt at all – whether the evidence as to the alleged confession was admissible – where in those circumstances it is not possible to draw out of the exchange at the front door any admission as to the alleged sexual misconduct – where one might infer that the event which prompted the appellant’s arrival was the complaint letter and the withdrawal from the program, but the mother’s question and his response did not go as to the nature of the complaint – where it could not be construed as an admission in relation to any alleged sexual misconduct – where if words spoken by an accused are reasonably capable of being construed as an admission by the accused, they are admissible – where in that situation it is for the jury to determine whether or not the words amount to an admission and what weight, if any, the admission should be given – where, however, here the words were not reasonably capable of being construed as an admission – where therefore the evidence of the appellant’s response was not capable of constituting an admission of guilt, and was inadmissible – where in the circumstances it was wrongly admitted, and, as the Crown concedes, one cannot conclude that it had no influence on the jury’s consideration of guilt – where the final result was that the jury was left to grapple with that piece of evidence when they

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should not have been doing so, because it was inadmissible – where notwithstanding its reception into evidence, had the trial judge concluded that it was inadmissible then that could have led to his Honour’s directing the jury that they must ignore that evidence completely – where the potential prejudice created by leaving that inadmissible evidence to the jury is obvious – where it is difficult to conclude that it did not influence the jury’s consideration in any way.

Appeal against conviction allowed. Convictions are set aside. The sentences imposed on 19 October 2017 are set aside. A retrial is ordered.

*R v Hannan; Ex parte Attorney-General (Qld)* [2018] QCA 201, 31 August 2018

Sentence Appeal by Attorney-General (Qld) – where the respondent pleaded guilty to the offence of money laundering – where she was sentenced to three years’ imprisonment, wholly suspended with an operational period of three years – where a total of 12 days of presentence custody were declared under that sentence – where the Attorney-General submitted that the penalty imposed on the respondent did not reflect the seriousness of the offence and the applicable maximum penalty – where it was further submitted that the sentencing judge was overwhelmed by consideration of the impact on the children, at the expense of recognising the very serious offence involved in laundering about \$650,000, where that was done with the full knowledge that the money constituted the proceeds of criminal activity – where in total, in a period of

approximately two years and 4½ months, the respondent was involved in the creation of 45 false invoices, totalling \$649,189 – where it was submitted that actual incarceration of a period between six and 12 months was warranted – where the respondent submitted that the sentence was not unreasonable or plainly unjust as it was open to the sentencing judge to take into account the effect on the children of their mother’s imprisonment – where it was submitted the children would be deprived of parental care and likely to suffer severe hardship – where this court has consistently held, including in *R v Chong; Ex parte Attorney-General (Qld)* (2008) 181 A Crim R 200, that hardship to family members cannot overwhelm considerations such as the need for denunciation, deterrence and punishment – where in other words it ought not be allowed to overwhelm the punishment which would otherwise be appropriate – where unlike *Chong*, this is not a case where the children will be left without proper care – where the evidence established that at the time of the sentencing both the respondent’s mother and her mother and father-in-law provided practical day to day assistance in relation to child care – where it is therefore right to conclude that whilst there will be some impact on the children in terms of separation from their parents for a period of time, they will not be left without appropriate care, and not left without care by a family member – where properly characterised, this is a case where separation by reason of the imposition of a custodial sentence on the respondent will inevitably affect the children, but

not in the exceptional way which is the hallmark of the principles in *Chong* – when that impact is balanced against the seriousness with which the legislature views that offending, and the need in drug trafficking and money laundering cases for denunciation and deterrence, it becomes apparent that the sentencing judge did permit the hardship to the children to overwhelm the punishment which would otherwise have been appropriate.

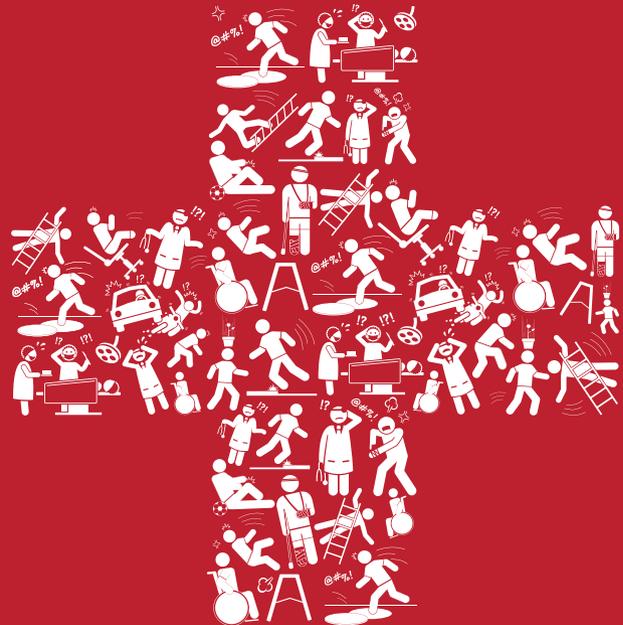
Appeal allowed. Set aside so much of the orders made on 27 November 2017 as wholly suspended the period of imprisonment for an operational period of three years. Order that the term of imprisonment imposed be suspended after serving five months. Otherwise affirm the orders made on 27 November 2017. Order that a warrant issue for the arrest of the respondent, to lie in the registry for seven days.

Prepared by Bruce Godfrey, research officer, Queensland Court of Appeal. These notes provide a brief overview of each case and extended summaries can be found at [sclqld.org.au/caselaw/QCA](http://sclqld.org.au/caselaw/QCA). For detailed information, please consult the reasons for judgment.

# PERSONAL INJURIES CONFERENCE

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Dusty Meadows



Linda Cannings



Tina Reynolds



Neal Wood



Max Sutton



Julia West



Sandy Zhang



Peta Yujnovich



Rebekah Lovely



Angela Heather



Alice Hoban

# Career moves

## Aitken Legal

Dusty Meadows has joined Aitken Legal as a lawyer in its new Sunshine Coast office. Dusty previously worked for MinterEllison in Brisbane as a paralegal in its HR and IR group while studying and then as a lawyer in the field of workplace injuries. Moving to the Sunshine Coast this year, she intends to focus on employment law.

## Best Wilson Buckley Family Law

Best Wilson Buckley Family Law has announced the expansion of its North Lakes office, which opened in March, with two appointments – senior associate Linda Cannings, and associate Tina Reynolds.

Linda, an accredited specialist in family law (NSW), has practised exclusively in that field since admission in 2003 in firms throughout Queensland and New South Wales, while Tina has practised in family law in Queensland. Tina has a commercial background, which gives her an understanding of complex property settlement matters.

The firm has also announced the promotions of Neal Wood to senior associate and Max Sutton to graduate solicitor.

Neal has worked exclusively in family law since his admission in 2008 and has been a part of the firm since early 2015 when he joined as an associate. Max was admitted to practice in 2017 and has been with Best Wilson Buckley since 2014, having worked in various administrative and support roles within the firm.

## Martens Legal

Martens Legal has announced its expansion to the Sunshine Coast with a new office at Maroochydore, and has welcomed solicitor Julia West, who practises in family law and estate planning. Prior to her admission in October 2017, Julia spent the year as an associate to a District Court judge.

## Moulis Legal

Moulis Legal has announced the appointment of senior associate Sandy Zhang as head of the dispute resolution practice in its Brisbane office.

Sandy, a commercial lawyer, has particular skills in intellectual property litigation and experience in handling China-Australia business issues. He is a member of the Queensland committee of the Intellectual Property Society of Australia and New Zealand and has been recognised by Doyle's Guide as a 'rising star' in the intellectual property and technology, media and communication category.

## Slater and Gordon

Slater and Gordon has announced the promotion of Sunshine Coast personal injury lawyer Peta Yujnovich to practice group leader, that of Shailer Park motor vehicle accident lawyer Rebekah Lovely to principal lawyer, and that of Ipswich public liability lawyer Angela Heather to senior associate.

Peta is focused on growing the firm's Birtinya and North Lakes offices, and is also a regular volunteer at her local community legal centre.

Rebekah recently achieved a successful outcome for a client who was seriously injured after falling from scaffolding. The client received support of more than \$1 million two to three times faster than usual.

Angela started at the firm in 2012 and has been a strong advocate for the Ipswich and western Brisbane community.

## WGC Lawyers

WGC Lawyers has announced the appointment of Alice Hoban as a senior associate in its commercial team.

Alice has experience working in all aspects of corporate, business and property law. Before relocating to Cairns, she worked for a global law firm in Brisbane. She has also worked in London for a university hospital and for a leading Adelaide law firm.

*Proctor career moves:* For inclusion in this section, please email details and a photo to [proctor@qls.com.au](mailto:proctor@qls.com.au) by the 1st of the month prior to the desired month of publication. This is a complimentary service for all firms, but inclusion is subject to available space.

# Generosity, and corporate reconciliation

If you've ever wondered what it feels like when your firm doubles its size overnight, purely from a gift, ask me.

That's exactly what happened a couple of months ago when my firm, Marrawah Law, was given the practice owned by Oliver Gilkerson, Gilkerson Legal.

The answer is that it feels amazing, humbling and exciting all at the same time. It also means that Queensland can now lay claim to one of the largest 100%-owned Indigenous law firms in the country, thanks to Oliver's generosity.

But this article isn't about Marrawah Law's good fortune. The aim is to salute one of the best practitioners I've ever met, and also to show how Indigenous reconciliation can benefit your firm.

Oliver will likely cringe reading this in his semi-retirement, but from his 30 years of legal work, he has earned the highest respect from both clients and his legal colleagues and adversaries as one of the best Indigenous law experts in the country.

Having been on the other side of the ledger from him on more occasions than I can count, I can say that he is formidable. His near-encyclopaedic knowledge of property law, savant-like ability to fill a work day with billable hours, unfailing tenacity and knack of thinking outside of the square make him a technically superior lawyer.

His decency, his integrity and level of care, particularly of Aboriginal and Torres Strait Islander people who have always and often still are bullied and bamboozled when confronted with legal issues, make him an unquestionably decent practitioner.

It was in March this year that Oliver invited me to a lunch apropos of nothing when he asked if I'd accept the gift of Gilkerson Legal so he could slip off into semi-retirement.

He said that he made his decision off the back of hearing that I'd sent flowers to an opposing solicitor because I knew they were having a terrible time. When things aren't going well, the legal profession can be a lonely and horribly dehumanising place and even though we were on different sides of the ledger, I thought the gesture would help in a very small way.



Marrawah Law owner and Principal Solicitor Leah Cameron with Oliver Gilkerson of Gilkerson Legal.

He told me those flowers, along with how Marrawah did business the "right way and not the easy way", cemented his decision to hand his clients across. But for someone to hand over a lucrative and long-standing practice for nix indicates something more.

I think the unspoken third prong of Oliver's decision was that much-banded and often-misunderstood thing called Indigenous 'reconciliation'.

## The other view of reconciliation

Australia's 'official' reconciliation process began in 1991 when the Royal Commission into Aboriginal Deaths in Custody showed the world what Aboriginal and Torres Strait Islanders have always known – that despite Australia cloaking itself in the virtues of the rule of law, mateship and a 'fair go' for all, underneath ran a deliberately-hidden dark thread of persecution and exclusion of 'outsiders', specifically, Indigenous people.

Since then reconciliation has taken on many shapes and forms all around the rubric of the definition of the word 'to re-establish friendly relations' by attempting to deal with Australia's elephant in the living room, its treatment of its Indigenous people. That's included admitting Australia's hidden history, appreciating the value of Aboriginal and Torres Strait Islander cultures and addressing disadvantage that are still endemic today.

While these atonements are necessary, I believe the greatest value that reconciliation has to Australian society is the more challenging and ultimately more beneficial permission of allowing Australia to deal with its own cultural superiority complex.

Reconciliation isn't a beating up of the psyche; it's an opening up. While uncomfortable and challenging, by developing a stronger understanding ourselves, our biases and motivations, we become more respected, we grow, and we learn. And that's on a personal level, on an organisational level, and ultimately nationally.

by Leah Cameron, with Mike Butler

## The real value to your firm

This sort of thing is now happening in the legal profession, with firms including Norton Rose Fulbright, King and Wood Mallesons, Allens, DLA Piper, Herbert Smith Freehills and Corrs, which have all adopted reconciliation actions plans (RAPs) into their corporate growth and personality structures.

All are now driving interaction with Aboriginal and Torres Strait people on a host of practical and meaningful levels. Recognising their value, Queensland Law Society launched its own RAP program to encourage the greater profession to begin engaging with reconciliation in 2017.

Having these RAPs marks firms as good corporate citizens, but I'm hearing that their value is well beyond titular. For starters, they are helping Indigenous communities by engaging with them.

And for the firms themselves the benefits are broader than you'd think. Externally, they are more attractive to socially progressive clients, as well as big corporates that are increasingly demanding RAPs and Aboriginal and Torres Strait Islanders themselves. Nuanced international clients, aware of Australia's inglorious past, are also taking note that these firms have the wherewithal to want to have meaningful cultural connections and respect: both handy attributes for foreign business.

Internally, changes are also happening. Employees from staff to partners are developing deeper, more meaningful understandings of Aboriginal and Torres Strait Islander cultures. They are given the space to safely question their own cultures, and in the process see how things can be thought of differently and how to deal with different cultures appropriately and openly. All are subtle but significant mind shifts that can make for better, more creative decision-making and ultimately happier clients.

So here's my challenge to you. Improve your practice by engaging in some form of reconciliation and see how you'll not only help Indigenous people but your business itself.

Learn about Aboriginal and Torres Strait Islander cultures. Unpack and confront your own opinions and beliefs and see how you'll be better for it. A practical way is engaging with Indigenous businesses or employing Indigenous legal staff.

Make every dollar that your firm spends count. Consider who does your catering, your office supplies, your office art, building fit-outs – whatever is needed to make your business tick – and ask if you buy from an Indigenous business. Commercially you'll be supporting Indigenous people and instead of giving a handout, give a hand up.

To connect with Indigenous businesses, have a look at Supply Nation, a nationally accredited scheme that links businesses to Indigenous-owned or operated service providers and manufacturers. See [supplynation.org.au](http://supplynation.org.au). Finally, think about developing your own RAP by going to [reconciliation.org.au](http://reconciliation.org.au) and get that corporate goodwill the others have.

It's these small acts that directly build and help our country as a whole to become a better place by accepting the oldest civilisation on Earth into our cultural fabric instead of rejecting it like has been done for so long.

Leah Cameron is the owner and Principal Solicitor of Marrawah Law, and is a Palawa woman from Tasmania. Mike Butler is an Aurora Project intern with Marrawah Law. He is a Murri man living in Sydney. For more information on engaging with Indigenous law students with the Aurora Project, see [auroraproject.com.au](http://auroraproject.com.au).

## Wanting to focus on your area of law?

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# Wellbeing

Queensland Mental Health Week (6 October to 14 October) includes World Mental Health Day on 10 October.

Earlier this year, a panel of experts at a Queensland Law Society mental health breakfast discussed early career lawyer (ECL) challenges and provided practical tips to help ECLs to thrive in the legal profession.

The panel received an overwhelming response, so this article has been prepared by members of the QLS Wellbeing Working Group with the aim of addressing some of the questions that went unanswered on the day.

Answers to more questions will be featured in an article in next month's *Proctor*, as well as in *ECL News*.

## How to have an effective performance review conversation

by Rolf Moses, QLS Chief Executive Officer

- Don't wait until the end of the year to get performance feedback. Seek regular feedback throughout the year. Ask how you are going? What could you improve on? Is there more you could be doing? What can you do to make your supervisor's life easier and serve clients better? What have you done well?

- Don't expect to get feedback without asking for it. Supervisors are busy and may not always remember to give you constructive feedback on the go. Also, everyone has different needs and expectations with regard to giving and receiving feedback. So, let your supervisor know what brings out your best.
- The key is to develop an accurate assessment of how your supervisor(s) regard your performance – and not wait for a surprise at the end of the year.
- When it comes to the actual performance review meeting, prepare. Complete all paperwork and feedback forms early. Leaving it to the last moment might be interpreted by your supervisor to mean that the meeting is not important to you. Indicate in the form, the questions you would like to ask and any concerns you have – including if you want to discuss remuneration. This gives your supervisor the heads up and time to consider responses.
- Make sure that you list your achievements and the strengths that you have demonstrated. Also list the areas of your performance that you want to improve and develop. Supervisors will appreciate staff who have an honest, realistic and confident assessment of their own performance. The key is balanced comments.
- High-performing employees think about what they can do to help their supervisors and the practice succeed – be prepared to discuss what you would like to focus on over the next 12 months and seek clarification on what will be needed and expected of you going forward.
- When it comes to discussing remuneration, it is fine to ask how salary determinations and or bonuses will be made and communicated. If you feel you deserve a review or bonus based on your performance, then you can let your supervisor know that you think this is reasonable. Remember, that salary increases are a combination of personal performance, overall business performance, economic factors and market comparisons. So there are lots of factors your firm needs to consider.
- Be positive and optimistic in performance reviews. Go in with the mindset that you are here to learn, develop and grow.

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by Rolf Moses and Sheila Kushe

Whenever you have a critical conversation (one in which the stakes are high and strong emotions are typically involved), you need to have a framework for the conversation.

You need to prepare, and you need to know what you need from the conversation – for example, recognition, acknowledgment, to be heard, to vent or all these – as well as arrive at a constructive solution that works for you, your clients and your organisation.

## How to discuss workload

by Sheila Kushe, QLS Professional Development Manager

Here are some steps to help set you up for success to have a critical conversation.

### 1. Preparing for the conversation

- a. **Facts:** In a task list, clearly set out all of your workload, small and big tasks and deadlines.
- b. **Productivity:** Is there anything on that list that can be 'chunked up' and that you can get through? Is there anything that a colleague can take off you? Can some of the tasks be delegated to support staff?
- c. **Building or maintaining trust:** We can typically have difficult conversations and find solutions with our supervisors if we have built mutual trust and respect. If you are new to the firm, or you have a new supervisor, it may be early days and the trust may not be in place yet. Be mindful of this when you enter the conversation. You are also trying to build trust or maintain trust during the conversation.

- d. **Asking for an appointment:** Be mindful of how you approach the discussion – your supervisor may not be aware of your struggles, so something as daunting as “we need to talk about my employment” may trigger your supervisor to think you are unhappy/wanting to leave. Make your intention known; “I’m struggling with my workload, can we discuss support options?” This will alleviate some of the unknown for your employer and give them the opportunity to prepare for the meeting as well.
- e. **Time and place:** Make an appointment or find a suitable time to talk about your matters (the sooner the better).
- f. **Emotions:** Be conscious of your emotions. Practise with a friend or in front of the mirror about what you are going to say in a clear, succinct and rational fashion.
- g. **Outcome:** Be clear at the start what you want the outcome to be. For yourself, what do you want from the conversation? What do you want the outcome to be?
- h. **Solutions:** Come with possible solutions that you can offer:
  - Is there anyone who you can team up with to do the tasks?
  - Can tasks be delegated to someone in the team?
  - Discuss new internal deadlines or deadlines with the client.
- i. **Rehearse:** Practise and rehearse the conversation with a friend.

### 2. The conversation itself:

- a. **Create a safe place:** Thank them for their time, ask them if you can discuss your workload. Remember they may not be expecting this conversation and they may be overworked, too.
- b. **Job satisfaction and workload:** Express that you enjoy your role and you’re learning a lot and you want to ensure that you are delivering the best quality work for all clients and at the moment you are struggling to do so with the workload, so you want to discuss possible solutions and are asking for their help with finding solutions.
- c. **Receipt of the request:** You cannot control how they will react however, providing your request in a rational, logical and calm fashion is the pathway of a professional. You may have hit a raw nerve, so watch the body language and non-verbal cues.
- d. **Facts and options:** Explain the facts and also your suggested solutions to alleviate workload. If you have a great supervisor, they will ask how they can help and what support you need from them.
- e. **Gratitude:** Thank them for listening, regardless of the outcome.
- f. **Don’t act too quickly:** If you don’t get the outcome you need, don’t overreact. Your supervisor may need to process the request. You may get a different outcome from them the next day when the emotion has come out of the situation.

As a QLS member, you have access to LawCare ([qls.com.au/lawcare](http://qls.com.au/lawcare)). We encourage you to use this resource, which allows you to talk to a professional who can help in dealing with strong emotions and reframe the situation. You also have access to QLS Senior Counsellors and the QLS Ethics and Practice Support Centre (see *the back page for contact details*).

# In October...

● Brisbane ● Livecast ● Regional

Practical Legal Ethics  Practice Management & Business Skills  Professional Skills  Substantive Law 

## 10 Managing vicarious trauma in the legal profession

7.30-9am | 1 CPD

Law Society House, Brisbane

Join us for this complimentary member breakfast during Queensland Mental Health Week. This event aims to raise awareness and create a better understanding about vicarious trauma in our profession.



## 11 Masterclass: Creating value in negotiation

8.30am-12.30pm | 3.5 CPD

Law Society House, Brisbane

Learn how to become a more effective negotiator and achieve better outcomes for your clients. Michael Klug AM, one of Australia's best-known teachers in negotiation skills, conflict management and ADR, will lead this unmissable masterclass.



## 12 Personal injuries conference

8.15am-5.30pm | 7 CPD

Brisbane Convention & Exhibition Centre

Keep up to date with recent legal developments for both plaintiff and defendant solicitors at the premier event for personal injuries practitioners. Now in its 18th year, this event is not to be missed. Take the opportunity to hear from leading experts and network with your peers.



## 16 Child protection legislation update

12.30-2pm | 1.5 CPD

Livecast

Join the experts for an in-depth review of key amendments to the *Child Protection Reform Amendment Act 2017* and their implementation to date.



## 19 CQLA & QLS conference

19-20 | Day one: 8.30am-5.05pm

Day two: 8.30am-12pm | 10 CPD

Empire Apartment Hotel, Rockhampton

This is a not-to-be-missed opportunity for local practitioners to get updates in key practice areas, support their local law association, and connect with the Society on all things trust accounts, practice support, ethics and career development.



## 23 PPSA: Why timing is everything

12.30-1.30pm | 1 CPD

Livecast

Join expert Scott Guthrie to gain practical tips on how the *Personal Property Securities Act 2009* (Cth) applies to common insolvency issues.



## 25 Modern Advocate Lecture Series: 2018, lecture four

6-7.30pm | 0.5 CPD

Law Society House, Brisbane

Featuring eminent members of the judiciary, each presentation in our highly regarded Modern Advocate Lecture Series deals with practical advocacy relevant to the junior ranks of the profession. Former District Court Judge John Robertson will deliver the final presentation of 2018. Networking drinks and canapés will be held after the presentation. The lecture will also be shared via Facebook Live on the night.



## 26 Essentials: Debt recovery A-Z

8.30am-1pm | 4 CPD

Law Society House, Brisbane

Take a systematic approach to successfully recovering your clients' debts. This intensive workshop provides a comprehensive overview, plus practical and strategic guides to debt collection and recovery. The workshop is ideal for early career lawyers, general practitioners and anyone who is looking to refresh their skills.



Earlybird prices and registration available at

 [qls.com.au/events](https://qls.com.au/events)

# Basic entitlements – parental leave

by Robert Stevenson



In this column, I outline the minimum parental leave requirements in the National Employment Standards which apply to all employees.

Employers can agree to greater amounts of leave or paid parental leave if they wish, but not less.

All employees must have at least 12 months continuous service to be entitled to parental leave. Casual employees must have been employed on a systematic and regular basis over that period and have a reasonable expectation that will continue.

Parental leave can be taken for birth or adoption-related leave. Parents and spouses (including same-sex couples) are entitled to up to 12 months unpaid parental leave if they will have responsibility for the care of a child. There are slightly different rules for the taking of leave depending on whether one or both parents take parental leave. To be eligible for adoption-related leave, a child must be under 16 and not have lived continuously with the employee for six months or more as at the date of placement.

There are detailed notice requirements in the *Fair Work Act 2009* for the taking of parental leave. Employees must, if possible:

- a. give their employer at least 10 weeks' notice of their intention to take unpaid parental leave
- b. specify the intended start and end dates of the leave
- c. confirm these dates or advise of changes to the dates at least four weeks before the intended start date.

An employee can request their employer to agree to an extension of unpaid parental leave of up to a further period of 12 months (unless their partner has already taken 12 months parental leave).

A response must be given within 21 days after the request is made and the employer can only refuse such a request on reasonable business grounds. A dispute can be referred to the Fair Work Commission for assistance, but only if the employer consents, whether in an enterprise agreement, employment contract or in a specific case.

When a pregnant employee continues working during the six weeks before the expected birth, the employer can require the employee to produce a medical certificate to evidence her fitness for work. If this is not supplied, and no safe alternative job

is available, the employee can be required to start their leave early.

A female employee is entitled to unpaid special maternity leave if she has a pregnancy-related illness or loses a child within 28 weeks of the expected date of birth. A pregnant employee is also entitled to transfer to a safe job in certain circumstances.

An employee is entitled to return to their pre-parental leave position or, if it no longer exists, an available position for which the employee is qualified and suited which is nearest in status and pay to the previous position. The employer must consult with an employee absent on parental leave if the employer makes a decision that will have a significant effect on the status, pay or location of the employee's employment.

Employers often strike trouble when they fail to consult employees about significant changes to the employee's job, or seek to make an employee's position redundant whilst they are on parental leave.

Separate arrangements exist outside the *Fair Work Act* for government-funded parental leave pay (including provisions about 'keeping in touch' days). These do not extend the periods of leave outlined above.

Rob Stevenson is the Principal of Australian Workplace Lawyers, [rob.stevenson@workplace-lawyers.com.au](mailto:rob.stevenson@workplace-lawyers.com.au).



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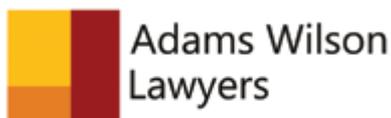
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with Matthew Dunn



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Is it time to reconsider our local drop and the impact it has made on the national palate? If Queenslanders aren't passionate advocates for the local vino, who will be?

As consumers, we've never had it so good. Australian wine is growing from strength to strength; we have great varieties from all the old world countries making a home in our wide brown land, exports in the billions of dollars<sup>1</sup> and some of the finest examples of the winemakers' art that can be found. There is sufficient volume to make for a highly competitive wine market which gives consumers loads of excellent choice at modest prices.

But have these good times come to Queensland, or are we just a northern oddity, battling against the inevitability of climate? If you look in the wine shops of our major cities, where once there were a number of local wines, usually only one or two brands remain. But why should this be so? Is there no quality in Queensland wine?

Many judge the heights of quality by listing in the yearly *Halliday Wine Companion*. The 2019 tome lists only one Queensland winery in its 'best of the best' five red star category, Boireann from the Granite Belt. There are three other Granite Belt wineries listed with five stars: Golden Grove, Heritage Estate and Symphony Hills Wines.

Witches Falls Winery is the only Queensland winery not from the Granite Belt to have five stars. All up that makes five great wineries in Queensland, equal footing with the Geographe region in Western Australia but less than the 60 noted in the Margaret River. Still, in Mr Halliday's 2010 edition he only cited Boireann as five stars.

In the 2019 'best of the best by variety', there are two local wines noted – the very impressive 98 points for the 2016 Boireann Shiraz/Viognier and 96 points for the 2017 Symphony Hills Gewurztraminer (albeit under the moniker 'New England'). These two wines were judged as mixing it with the best and, in the case of the Boireann, standing beside the mighty Clonakilla from the Canberra district to be the very best there is. For the record, no Geographe wines made it into the very top flight.

The Halliday ratings are not the be all and end all of wine. Some smaller producers may not send their wines in to be reviewed and, as with

everything about wine, the ratings are very subjective. But, it does show that high quality exists and can be obtained from local wines. This story hasn't changed since the 19th Century when the first vines were planted.

The conundrum of availability is more perturbing. One specialist retailer admitted that Queensland wineries don't do much to promote their stock and keep it front of mind.

"Other interstate wineries are here all the time, but you hardly see the Queensland guys," he said. "You have to chase them, and who has time for that?"

Perhaps it is just a function of small production and healthy online sales, and that is all good. But without more exposure of great local wines accessible in local shops, the understandably dour view of Queensland wine will remain. The sustainable future for our local wine is not in cellar door experiences but the hard edge of retail availability.

Let's drink to that happening.

## Note

<sup>1</sup> Australian wine exports increased by 15% to \$2.56 billion in the 12 months ending December 2017, according to Wine Australia.

**The tasting** Three local wines from a variety of producers were exposed to the tasting glass.



The first was the **Nouva Scuola 2016 South Burnett Barbers** which was a red brick colour with a brown tinge. The nose was morello cherry and burnt match. The palate showed some significant heat on the fruit, acid and some spice and mushroom.



The second was the **Wisehill Amarco Granite Belt Cabernet Shiraz** which was a deep red-purple with a good vibrant hue. The nose had some menthol and mint with the savoury spice of white pepper and even floral rose touches. The palate was fulsome and had a lovely backbone of a tannin running through its nutmeg and black currant fruit which was quite charming.



The last was the **Golden Grove 2016 Granite Belt Mourvèdre** which was the darkest purple red you could imagine. The nose was the sweet vanilla of American oak and some handsome forest floor textures which promised a wild ride on the palate. The attack was initially red forest fruits with a hint of leather strap and an exuberance of acid and depth of tannin making a very classy and smooth wine that was out of the ordinary but highly enjoyable. A long life ahead for this one.

**Verdict:** The favourite was the Golden Grove; it showed a very deft touch in winemaking and imagination to do something interesting with good fruit. A lovely wine.

Matthew Dunn is Queensland Law Society Policy, Public Affairs and Governance General Manager.

# Mould's maze

By John-Paul Mould, barrister  
and civil marriage celebrant  
jpmould.com.au

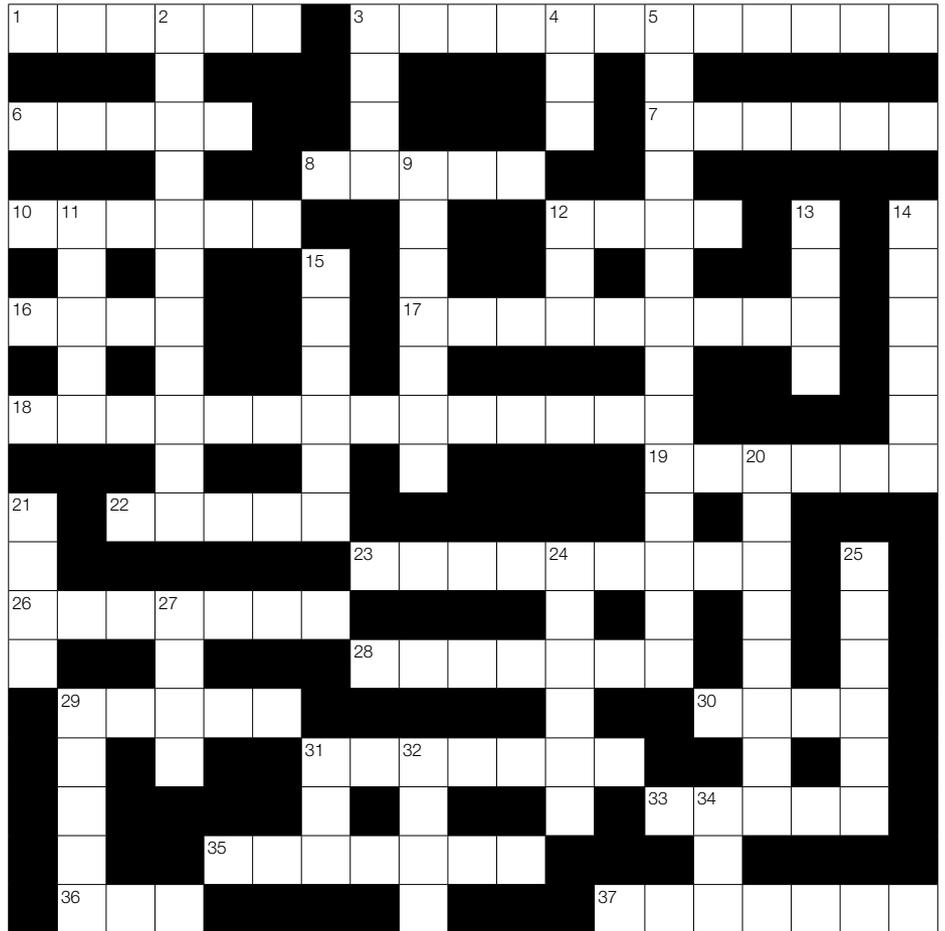


**Across**

- 1 Defence providing that, before a claimant commenced proceedings, the defendant had unconditionally offered the amount due. (6)
- 3 Lord Atkin referred to this fictional character in *Liversidge v Anderson*. (2 words) (12)
- 6 Court permission. (5)
- 7 A ..... order is the *Uniform Civil Procedure Rules* equivalent of an Anton Piller order. (6)
- 8 High Court case concerning overturning a trial judge's assessment of witness credibility, *Fox v .....* (5)
- 10 An action to recover land must be brought within ..... years. (6)
- 12 A person appealing to the Queensland Court of Appeal must arrange preparation of an appeal ..... (4)
- 16 A .... order prevents payment of money. (4)
- 17 Originating process to be served interstate must comply with the *Service and ..... of Process Act 1992*. (9)
- 18 Insertion of new language between previous sentences in a contract or will. (14)
- 19 The QBCC may not issue a notice to rectify building work if it would be ..... to do so. (6)
- 22 Public disgrace; loss of civil rights. (5)
- 23 Company directors owe companies a duty to exercise care and ..... (9)
- 26 Print a final copy of a legal document. (7)
- 28 Documents disclosed must be provided at trial if a notice to ..... has been given. (7)
- 29 A Queensland civil proceeding must be started by ..... unless the UCPR requires or permits otherwise. (5)
- 30 One in whom fee simple is vested subject to a life tenancy. (Scot.) (4)
- 31 Raymond Carroll's perjury indictment in the trial of the murder of Deirdre ..... was stayed because of double jeopardy. (7)
- 33 A notice of appeal to the QCA must be filed within twenty-..... days. (5)
- 35 Family Court decision concerning wastage of matrimonial property. (7)
- 36 The threshold for claiming gratuitous domestic services is ... hours a week for at least ... months. (3)
- 37 ..... liability is distinct and separate from the liability of others. (7)

**Down**

- 2 SPER may provide a debtor a Work and ..... Order in satisfaction of monies owed. (11)
- 3 Employ; rent. (4)



- 4 An affidavit relied on in a Queensland civil proceeding served on a party less than ... business days before the hearing requires the attendance of the deponent in court. (3)
- 5 Cessation of a civil claim. (14)
- 9 A court may refer a question of fact to a 'special ..... to decide the question. (7)
- 11 An assembly of ecclesiastics and important laymen who counselled English monarchs on judicial problems. (Arch.) (5)
- 12 Filing reference for Brisbane Federal Circuit Court matters. (Abbr.) (3)
- 13 If two years have passed since a step was taken in a Queensland civil proceeding, the court may dismiss it for .... of prosecution. (4)
- 14 Formal address of QCAT judicial officers. (6)
- 15 Beneficial interest. (6)
- 20 A ..... order is the UCPR equivalent of a Mareva order. (8)
- 21 First president of the Queensland Bar Association, Arthur ..... (4)
- 24 Under the Pointe ..... principle, any increase in land value due to the scheme underlying a compulsory acquisition is to be disregarded. (6)
- 25 Apologies and expressions of ..... are not admissible in Queensland civil proceedings. (6)
- 27 A civil court must be satisfied when granting summary judgment for a plaintiff that the defendant has no .... prospect of defending all or part of the claim. (4)
- 29 In a proceeding for an employment claim under the UCPR, the defendant may not rely on a ..... claim. (5)
- 31 High Court case providing that, intent is a presumed element of a grave criminal offence, *He ... Teh v R*. (3)
- 32 Lacking any legal or binding force. (4)
- 34 In assessing general damages for personal injury in Qld, a court applies an .... (Abbr.) (3)

**Solution on page 56**

# Did you hear about Wolverine?

## Imagining life after the gossip ban

by Shane Budden



### This month, I have to start with a disclaimer about this column.

I realise that, over the years, my column has been put to many uses – plugging mouse-holes, as a drop-sheet under the guy in the lunchroom who chews with his mouth open, and as a cautionary tale along the lines of idle hands doing the devil's work – all of which are fine uses for it. Certainly, they are far more beneficial than actually reading it, unless you are collecting evidence in support of switching to robot lawyers.

What you cannot do, however, is use the content of the column for gossip, which has recently been identified as the most evil force on the planet other than Manchester City, now that Osama Bin Laden is dead. If you aren't as in tune with the legal *zeitgeist* (literally, 'zit cream') as I am, you may not have heard that anti-gossip clauses are the new black when it comes to employment contracts.

Now you may think that the idea of banning gossip is bad, given that it is almost Trumpian in its pointlessness, stupidity and lack of practical possibility ("I will build a wall against gossip, and North Korea will pay for it!"), but there are some positives.

For a start, if employers have the time and resources to ban gossip in employment contracts (I mean putting the ban in the contracts, not banning gossip in the contract wording itself) it must mean that they have cleansed their workplaces of real problems, such as sexism, racism and bullying, which is clearly a good thing.

Also, however, banning gossip should mean the end of 'reality' TV shows, because they seem largely to exist to give people the chance to talk incessantly about the qualities of people they don't know, based on the scripted conversations these people have with one another while sitting around the set of a TV show. In short, you could get more reality from watching a conversation between the Easter Bunny, the Tooth Fairy and Phil Gould.

There are some downsides to banning gossip, however, in that it might make general conversation at work problematic, in the same sense that our federal parliament is problematic, albeit with fewer childish insults. In fact, now that I think about it, the ban on gossip should probably not extend to politics, because gossip is the major – and perhaps only – policy driver in Canberra at the moment.

Workplace conversations will now be a little different too. In order to help you navigate work discourse in this brave new world, I have prepared the following handy chart:

Before gossip ban	After gossip ban
"Good morning"	"I hereby non-judgmentally acknowledge your presence this morning, without in any way suggesting that it is good, bad or indifferent, or implying that you should feel any particular way about the day or any part thereof."
"How was your weekend?"	"I fully and completely understand that whatever you did (or did not do) on the weekend is none of my business and I apologise unreservedly if you feel that I have contravened your privacy in any way."
"Is Donald Trump stupid, or what?"	"Is Donald Trump stupid, or what?" <sup>1</sup>

To see how this might play out in the real world, I have prepared the following case study. As a bonus, doing the case study will allow you to claim a CPD point in Ethics.<sup>2</sup>

**Alice:** Did you see Jenny's engagement ring? It's beautiful, she and Tom make a great couple; I am so happy for them!

**Bob** (consulting procedures manual): Sorry, those topics are not on the approved list. Also, I have to report you to HR, the CCC and several other capital letters for implying that Jenny is overly materialistic, celebrating Tom's attempted exploitation of Jenny via their difference in financial means, and bullying any couple not named Tom and Jenny via exclusion aggression. For future reference, acceptable topics of conversation include the annual report, the joys of process-mapping and the bus timetable.

**Alice:** I am going back to my uni job of sorting recyclable products from medical waste.

Although I have taken a somewhat flippant approach to this issue, in my defence I would like to point out that I do that with every issue (a good title for this column would be 'Somewhat Flippant'). I also point out that I in no way condone gossip, partly because it can be hurtful and also harm productivity, but mostly because it is almost never about anything interesting, by which I mean me.

Hopefully, you are now aware of the dangers of gossip and will think twice before you compliment co-workers on their outfit or wish them well on their holidays. Of course, many of you will have become addicted to gossip over the years, and may be unable to go 'cold turkey', so if you must gossip I will leave you with this: have you noticed that you never see me and Wolverine in the same room? Think about it...

© Shane Budden 2018. Shane Budden is a Queensland Law Society ethics solicitor.

#### Notes

<sup>1</sup> Some things transcend gossip.

<sup>2</sup> NB: Claim may not be accepted.

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## Crossword solution

From page 58

**Across:** 1 Tender, 3 Humptydumpty, 6 Leave, 7 Search, 8 Percy, 10 Twelve, 12 Book, 16 Stop, 17 Execution, 18 Interlineation, 19 Unfair, 22 Atimy, 23 Diligence, 26 Engross, 28 Produce, 29 Claim, 30 Fiar, 31 Kennedy, 33 Eight, 35 Kowaliw, 36 Six, 37 Several.

**Down:** 2 Development, 3 Hire, 4 Two, 5 Discontinuance, 9 Referee, 11 Witan, 12 BRC, 13 Want, 14 Member, 15 Equity, 20 Freezing, 21 Feez, 24 Gourde, 25 Regret, 27 Real, 29 Cross, 31 Kaw, 32 Null, 34 ISV.

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